THE PRINCIPLES

OF

The Law of Transfer of Property

(*INTER VIVOS.*)

As embodied in Act IV of 1882.
With amendments and case-law brought up to January, 1932.

BY

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Civil Procedure Code, etc

'He knoweth not the Law who knoweth not the reason thereof.

M. C. SARKAR & SONS,
Publishers & Book-sellers.
15, College Square, Calcutta.

N. M. RAY CHOWDHURY & CO.
Book-sellers & Publishers.
11, College Square, Calcutta.

1932

First Edition—*March, 1914.*
Second Edition—*April, 1917.*
Third Edition—*September, 1918.*
Fourth Edition—*December, 1919.*
Fifth Edition—*January, 1921.*
Sixth Edition—*March, 1922*
Seventh Edition—*April, 1924*
Eighth Edition—*March, 1926.*
Ninth Edition—*April, 1928,*
Tenth Edition—*October, 1929*
Eleventh Edition—*February, 1932.*

Enquire of :

(i) N. M. TRIPATHI & Co.
Kalbadevi Road, Bombay.

(ii) RAM NARAIN LAL,
Katra, Allahabad.

(iii) BOOK COMPANY,
4-4A, College Square, Calcutta

(iv) EASTERN LAW HOUSE,
15, College Square, Calcutta

Published by H. GHOSE, B.A.,
"Sarat Villa"
26, Giris Mukherjee Road,
Bhowanipur, Calcutta.

Printed by K. C. NEOGI,
NABABIBHAKAR PRESS,
91-2, Machuabazar Street,
Calcutta.

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INTRODUCTION.

Nature of the Act : The T. P. Act aims at codifying a particular branch of law. Just as the Indian Succession Act relates to devolution of property after death, so the T. P. Act deals with transfer *inter vivos* of interests in property. It is in a way, supplemental to the Contract Act so far as it relates to immoveable property (see sec. 4), and completes the law of intestate and testamentary succession by harmonising the rules which regulate the transmission of property between living persons with the rules affecting its devolution upon death. It practically serves the same purpose in India as the law of Real Property does in England. The T. P. Act however does not contain the whole law on the subject of property.*

T. P. Act is a particular branch of the law of transfer and is supplementary to certain other enactments.

What is "Property" ? Property is a species of *jus in rem*. It is a right residing in a person, over or to a person or thing (movable and immoveable), and availing against other persons universally or generally. It is sometimes loosely used

Property as understood in T. P. Act. Mad. 1902.

* *Shafikul* v. *Krishna*, 28 C. L. J., 77.

for a thing over which certain rights exist. It is the subject-matter of ownership and is sometimes equivalent to ownership itself, and may then be defined after Austin as a "right over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration." The futility of this definition becomes apparent when we remember that we cannot even enjoy our property to the detriment of others or in opposition to their right of easement (*sic uteri tuo ut alienum non lædas**). It is an aggregate of a man's faculties, and legal rights. "It is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which a party can have"; *Jones* v. *Skinner*, 5 L. J. Ch. 84, 90. It is in this *wide sense* that the term "property" has been used in this Act. Specifically we may mention that among other things property includes as well—right of redemption, actionable claims, vested remainders, easements, patents, copyright, trade-marks, franchises, etc.

N. B. The term *Property* has not been defined in the Act. It appears that the Law Commissioners had intended to define the term in the words of the New York Code which are follows:—"The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others; the thing of which there may be ownership is called property." These two main elements *free use* and *exclusion of others* appear in almost all the definitions that have been given of the term in the various systems of jurisprudence. In

* "So use your own property as not to injure your neighbour's."

Hindu jurisprudence too we have the same thing. Jimutavahana defines ownership as "the absolute use of a thing according to the pleasure of the owner." This conception of the term is subjective ; but modern jurisprudence has also given it an objective significance. It now imports both a legal concept and a thing. With the increase of the complexity of ideas and actions, original conception of the word has undergone modification so as to admit *of restricted* enjoyment and *limited* exclusion. The students would do well to trace the different stages of the growth of the idea of property. The primitive conception of property (practically) starts with what we call *occupatio* (or acquisition of property by taking possession of a thing which belonged to no one) under the Roman Law. In the pre-Society days what the rude man could seize or capture would be his *property*, whether it be a thing or a woman. The Roman Law of Mancipum is also based upon a like crude notion of property. In course of time, social relations between man and man came to be established and people learnt to respect mutual rights and came to acquire the conception of *dominion* and *proprietas*.

Scope of the Act.

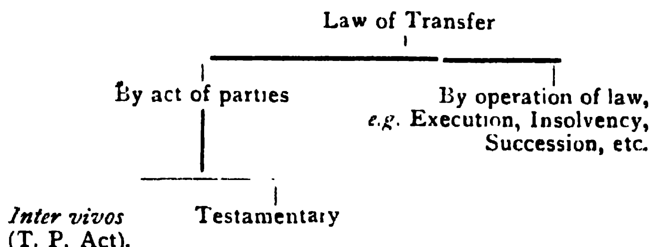
Scope of this Act : The operation of this Act is strictly confined to transfers of property by act of parties *inter vivos*, *i.e.*, voluntary transfers between *living* persons. (*a*). It does not affect in any way the transfers by operation of law, or *ex lege*, (*e.g.*, in the case of insolvency, forfeiture, execution-sale or inheritance) save as provided by sec. 57 and Ch. iv of this Act. See cl. (d) of sec. 2.

The Preamble : is important inasmuch as it indicates the aim and the extent of the operation of this Act. The main intention of the T. P. Act is *to* define *and* amend *certain parts of the law relating to the transfer of property by act of parties.* Thus, it simply stereotypes and amends the existing

(*a*) *Parthasarathy* v. *Venkatadri*, 46 Mad, 190=43 M.L. J. 486.

Are all transfers of property governed by the T. P. Act?—No. Mad. 1911.

law on the subject and does not introduce any novel principles (16 All., 295). The preamble shows that the Act is by no means exhaustive. The following table will enable us to realise what part of the "law of transfer" is covered by this Act.



Arrangement of the Act—The whole law of transfer *inter vivos* given in this Act has been condensed into 135 sections divided into 8 chapters according to the different classes of transfers.

Chapter I contains 4 sections and deals with preliminary matters, such as extent of operation and definitions.

Chapter II contains 50 sections (sec. 5 to sec. 53A) and deals with the general rules relating to transfer of property, moveable or immoveable. This chapter is divided into two parts; the first part contains secs. 5-37, and treats of transfers of moveable as well as immoveable property; the second part contains secs. 38-53A and is applicable to transfers of immoveable property only. The new section 53A deals with the doctrine of Part Performance.

Chapter III contains 4 secs. (secs. 54-57) and relates to Sales of immoveable property.

Chapter IV contains 43 secs. (secs. 58-104) and deals with Mortgages of immoveable property and Charges.

Chapter V contains 14 sections (secs. 105-117) and treats of Leases of immoveable property.

Chapter VI contains 4 sections (secs. 118-121) and relates to Exchange.

Chapter VII contains 8 sections (secs. 122-129) and deals with Gifts.

Chapter VIII contains 8 sections (secs. 130-137) and deals with transfers of Actionable Claims.

CHAPTER I.

Territorial exemptions of the Act.

Preliminary. The Transfer of Property Act* (Act IV of 1882) came into force on the first day of July, 1882 (Saturday, 18th Ashar, 1289, B. S.). The amendments introduced by the amending Act of 1929 are in force from the *first day of April*, 1930. It was formerly intended to extend to the whole of British India except Bombay, the Punjab and British Burma. But since 1st January 1893, it has been extended to the Bombay Presidency and from 22nd December, 1924, it has been extended to the whole of Burma excepting certain specified areas. The Act has been extended also to the province of Sindh with effect from 1st January, 1915.

Sec. 54 (paras ii and iii) and secs. 59, 107, 123 make registration compulsory in the case of certain forms of transfers (*e.g.* sales, mortgage etc.). As these sections are supplemental to the rules of the Registration Act (*vide* sec. 4, *infra*), they do not apply in any part of the country where the Registration Act is not in force. Besides the Local Governments will have power to withhold their operation from any particular territories under their administration by means of notifications in the local official gazettes.

When retrospective effect is given to an Act.

T. P. Act—if retrospective*?—As a matter of principle retrospective operation is not given to a statute so as to impair an existing right or

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* In a Full Bench decision of the Calcutta High Court it has been held that "the rule against retrospective operation is intended to apply not so much to law creating a new right as to a law creating a new obligation or interfering with vested right", *Jogodanund v. Amrita Lal*, 22 Cal., 767 (F.B.) at p. 777.

obligation, otherwise than as regards matter of procedure. Cf. *Jagabandhu* v. *Magnamoyi*, 44 Cal., 555. So it has been held that in matters of substantive rights statutes are not to be so read as to take away vested interests, but in matters of procedure they are general in their operation, *Bhobo Sundari* v. *Rakhal Chunder*, 12 Cal., 583, F. B. The retrospective application of a statute dealing with substantive rights may possibly affect an existing status prejudicially and may thus lead to much hardship and injustice ; see *Marin* v. *Stark*, (1890) 15 A. C., 384. To alter the substantive rights is to alter or break the implied contractual relationship of the members of society making a confusion between all rights and duties ; and this may considerably affect the social equilibrium But to alter the procedure involves no breach of this implied contract and therefore in no way imperils the safety of any community. That is why a man though unable to claim any vested interest in any form of procedure can always continue to enjoy his existing rights unaffected by any change of law.* The T. P. Act being pre-eminently a codification of substantive rights, and not merely of procedural law, can necessarily have no retroaction (†)

Sec. 2 : This section provides for the repeal of certain Acts. The repealed Acts have been

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* *Colonial Sugar Refining Co* v. *Irving*, (1905) A. C. 369 ; *Delhi Cloth & C. M. Co* v. *Income Tax Commr.*, 32 C. W. N. 234 =47 C. L. J. 1, P. C.

† Cf. 42 Mad. 589=23 C W. N. 589 (P. C.)

enumerated in the Schedule annexed. As this Act cannot have a retrospective effect, this section further provides that nothing in the Act shall be deemed to affect—

(*a*) Any enactment not hereby expressly repealed ;

(*b*) Any contractual relationships and any incidents of property created and allowed by law for the time being in force, and not being inconsistent with the T. P. Act.

(*c*) Any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability ;*

N. B. Under cl. (c) above the rights, liabilities or reliefs arising out of a legal relation constituted prior to this Act, are not affected as the Act has no restrospective operation. But there is a clear distinction between "relief" and the mode or procedure for obtaining such relief, and the Act, though it does not touch the substantive right to get a particular relief, does not spare the procedure whereby the relief is secured, see *Bhobo Sundari* v. *Rakhal Chunder*, 12 Cal, 583 (589) F. B.

Discuss whether the provisions of the T. P. Act affect (i) any right, liability or relief in respect of any legal relation constituted before the Act came into force and (ii) the procedure for obtaining such relief. B. L. (Int.) 1923 (July). 1925 (July).

(*d*) Any transfer by operation of law or by or in execution of, a decree or order of a Court of competent jurisdiction save as provided by sec. 57, and chapter iv of the Act.

and *nothing in the 2nd Chapter of this Act shall be deemed to affect any rule of* ** *Muhammadan* ** *law.* †

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* Vide *Durgi Nikarini* v. *Goberdhun*, 20 C. L. J., 448 (451).

† The astericks mark the omission of the words "Hindu and" or Buddhist" from the section.

Reservation in Cl. (d) only excludes Mahomedan Law from the operation of this chapter.

The words "Hindu" and "Buddhist" have been omitted from the above reservation in italices in Cl. (*d*), but the word "Mahomedan" has been retained. Formerly, there were many points of difference between the provisions of this chapter and those of indigenous Hindu and Buddhist laws (*e g.* as regards transfers in favour of unborn persons) and as there was no intention on the part of the Legislature to override any of the special provisions of Hindu and Buddhist laws inconsistent with the rules of this chapter, it was expressly declared that nothing in this second chapter would prejudice any of those special provisions. But this second chapter as it *now* stands after the amendment of 1929 does not show any conflict between its provisions and those of .Hindu and Buddhist laws and therefore, now, no saving provision is necessary to safeguard them. So the words "Hindu" and "Buddhist" have been deleted with the result that the provisions of Chapter II will apply to the Hindus and the Buddhists in their entirety. Since the rules contained in this chapter are not in all cases in perfect unison with the personal laws of the Mahomedans, the word, "Muhmmadan" has been retained and the reservation in italics declares that in case of any conflict between the provisions of *this chapter* and those of Mahomadan law, the latter prevail.

N. B: Execution sales being exempted by cl. (d) from the operation of this Act, do not stand in need of registration.

Definitions.

Explain with illustrations the terms "immoveable property" and "attached to the earth." Mad., 1902.

Sec. 3. *Immoveable Property.* This Act does not define what immoveable property is; it simply says that immoveable property does not include standing timber, growing crops or grass. To learn what immoveable property is we should turn to section 3 of Act III of 1877 (Indian Registration Act) where it is laid down that "immoveable property includes lands, buildings, hereditary

allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth but not *standing timber*,* *growing crops*, nor *grass*." (The italics indicate the source whence the definition given in the T. P. Act has been obtained). See also sec. 3 (25) of Act X of 1897 (General Clauses Act). The expression, "Immoveable Property", comprehends all that would be *real* property according to English law and *possibly more*, 13 B. L. R. 154 (P. C.). Thus, while a lease of immoveable property for a number of years, is *personal* property under the English law, it is immoveable property under the T. P. Act.

Attached to the earth—means (*a*) rooted in the earth, as in the case of trees and shrubs ; (*b*) imbedded in the earth, as in the case of walls or buildings ; or (*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. Such attached things are known as **fixtures**. [*N. B.* The doors and windows fall within class (*c*), Cf. 38 Mad., 18, but not the machineries set up inside the building which shelters them. Cf. 46 All., 286.]

Actionable claim—means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property, or a claim to any

What is an actionable claim? 1918 (Aug.) 1920 (July.) 1921 (Jan.) 1924 (Jan.) Mad. 1915.

* The term virtually means a tree which has been reduced to timber but yet unsevered from the ground.

beneficial interest in movable property not in the possession, either actual constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent ; (*vide infra*).

Define an "actionable claim", and explain your definition by giving instances of what are, and what are not, actionable claims.
B. L. Int. 1922 (Jan.)

In order to be an actionable claim it should be :—

(i) A *claim to any debt*—but the debt should not be secured by a mortgage of immoveable property or by hypothecation or pledge of moveable property ; or,

(ii) A *claim to any beneficial interest* in movable property —provided the property is not in the actual or constructive possession of the claimant ;

(iii) Such a claim that a Civil Court may recognise it as affording grounds for relief.

N.B. Under sec. 137, negotiable instruments, mercantile documents, stocks, shares, debentures etc. are not actionable claims within the meaning of chapter viii of the T. P. Act.

Instances of Actionable claim :—The present definition of actionable claim as amended by Act il of 1900 seems to identify the term with what the English lawyers call a chose-in action*. An annuity is a chose-in-action ; so is copyright or a patent. A right to claim the benefit of a contract for the purchase of goods is an actionable claim, 34 Cal., 289. A right to set aside a document executed by a minor is an actionable claim. Negotiable instruments are choses in action but they are excluded from the operation of Ch. viii, (*supra*).

"A share in a partnership is a chose-in-action—Gour's T. P. Act, p. 1924. This view seems to follow also from the decisions in 27 Cal., 93 and 16 C. L. J., 436 ; but much can be said against it.

* *Chose-in-action* : "A *chose* means a *thing* and a *chose-in-action* means a thing to get possession of which an action must be brought."—*Gour*. It is thus opposed to a *chose-in-possession*.

The vendor's right to receive the purchase money after he has completed the sale is an actionable claim being then a "debt" due from the purchaser inasmuch as the "vendor's lien" is not a mortgage.

(b) The vendor's right to receive the unpaid purchase money after the sale has been completed? B. L. Int. 1917 (Aug.)

A chattel interest is not a chose-in-action. A claim for damages for breach of contract is not an actionable claim but a mere right to sue. Note that the benefit of a contract *before* breach may be an actionable claim, but *after* breach it is not so ; see 30 Cal., 345 and 26 C. W. N. 285.

(c) Claims for damages after breach of contract ; B. L. (Int.) 1929 (Juy.)

Arrears of rent, though a first charge on the holding of the tenant, is a mere debt within the meaning of the secfion and is not a debt secured by a mortgage of immoveable property, 4 Pat., 43.

(d) A decree of a Court : 1915 (July), 1921 (Jan.)

A *decree* is not a "debt" within the meaning of an actionable claim as used in sec. 131 of the T. P. Act A *debt* under that section means an actionable claim, and not a claim which has already passed into a decree ; *Afzal* v. *Ram Kumar*, 12 Cal., 610 ; 40 M. L. J. 124.

*** *Debt secured by mortgage of immoveable property :* The High Courts of India are not unanimous in their opinion as to the true nature of the debt secured by mortgage of immoveable property. The Bombay High Court has held that for the purpose of execution of a decree under C. P. C. such a debt is to be regarded as movable property (4 Bom. L. R. 181). The views of the Calcutta High Court on this point appear to be rather conflicting. In 9 Cal., 511, such a debt is thrown into the category of immoveable property. In that case his Lordship observed, "a mortgage is not a mere debt, it represents a substantial interest in the mortgage property, *viz.*, the right of selling under certain conditions in realisation of the debt," But in 6 C. W. N. 5 a contrary view appears to have been held. The

Nature of debt secured by mortgage of immoveable property. Is it moveable or immoveable? B. L. (Int.) 1930 (July).

Madras High Court interprets such a debt as a "benefit to arise out of land" within the meaning of the General Clauses Act, and therefore according to that High Court it is to be regarded as an immoveable property for the purpose of attachment and sale under C. P. C. The Allahabad High Court upholds the view of the Bombay High Court and that of the Calcutta High Court in the 6 C. W. N., case. According to a recent Calcutta decision* a mortgage debt is immoveable property for the purposes of both Sec. 54 of this Act and Sec. 17 (*b*) of the Registration Act. The debt separated from the Security is however *movable* property, see 35 C. W. N. 1034=54 C. L. J. 117, P. C.

Define "Notice." B. L. 1910 (Jan.) 1923 (July.) 1924 (Jan.) 1925 (Jan.) 1928 (Jan.) 1930 (Jan) 1930 (July.) 1931 (Jan.) Mad. 1901. Bom. 1901. All. 1925.

Notice, according to the English law, is of *two* kinds :—(*a*) actual notice, (*b*) constructive notice, notice to agents being considered a special subdivision of this kind. The Anglo-Indian law, however, prior to the amendment of 1929, admitted of a *tripartite* division, *viz.*, actual, constructive and *imputed* notice† But by the amendment of 1929, the English classification, which is more scientific, has been adopted. A person is said to have

When is a person said to have *notice* of

Actual notice of a fact when he *actually*

* *Sakhiuddin* v. *Sona-ulla*, 27 C. L. J., 453. per Richardson, J.

† "Notice is properly speaking of *three* kinds. It is said to be 'actual' when the person actually knows the fact, and 'constructive' when he would have known it, but for gross negligence or wilful abstention from an enquiry or search which he ought to have made. It is called 'imputed' when information of the fact is given to or obtained by a person's agent...The term 'Constructive notice', however, is frequently used in a larger sense, but not very accurately so as to include what I have called 'Imputed notice,' which may itself rest on construrtive notice, in the English, if not in Anglo-Indian law"—Ghose's *Mortgage*, p. 436.

knows it, or in other words, when it is actually within his knowledge; so mere vague reports from uninterested persons or mere suspicion of the existence of a fact are not equal to an express notice. A person is said to have **Constructive Notice** of a fact when (i) but for *wilful abstention* from an enquiry or search which he ought to have made, or (ii) *gross negligence*, he would have known it. Constructive notice has been defined in *Hewitt* v. *Loosemore* (9 Hare, 449) as "knowledge which the Court imputes to a person upon a legal presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated." This presumption will arise (i) when the person *wilfully avoids notice* or (ii) when the party is so *grossly negligent* about himself that but for his negligence he would have got the notice. Thus, when one has a notice of a deed and has had a fair opportunity of examining its contents, he is assumed to be cognizant of all the covenants or agreements or other conditions and incumbrances covered by the deed. Notice of a fact is generally regarded as notice of its causes. A man taking a mortgage is expected to insist on production of the mortgagor's title deeds, failing that he will be presumed to have constructive notice of the title deeds remaining with a prior mortgagee, 51 Cal, 86=39 C. L. J., 186, P. C.

a fact. B. L. (Int.) 1925 (July.)

Explain what is meant by Constructive Notice. B. L (Int.) 1924 (Jan.) 1920 (Jan.) Bom. 1902. Illustrate your answer by an example.

Illustrate the different forms of constructive notice, B. L. (Int.) 1925 (July.)

Notice of an instrument is notice of its contents. B. L. (Int.) 1930 (Nov.)

The amending Act of 1929 has added the three following *explanations* to the clause defining Notice.

Explanation I.—Where any transaction relating to immoveable property is required by law to be

and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-sec. (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any sub-Registrar within whose sub-district any part of the property which is being acquired or of the property wherein a share or interest is being acquired, is situated.

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.—Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice

of the title, if any, of any person who is for the time being in actual *possession* thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

Provided that, if the agent *fraudulently* conceals the fact the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

Explanation I : **Registration as notice** : In England where the system of public registry is still imperfect it has been laid down that registration is not *of itself* sufficient notice. The American Jurists hold the contrary view. In India, formerly there was a great conflict of decisions over this question. The High Courts of Bombay and Allahabad, following the American doctrine, held that Registration was notice and made it incumbent for every subsequent purchaser to make a search in the common Registry for prior encumbrances (6 Bom. 168 ; 9 Bom. 427 ; 26 Bom. 538 ; 16 All., 478). The Madras High Court held that registration did not amount to notice in any case (15 Mad. 268). The Calcutta High Court, in some cases (23 Cal. 790 ; 27 Cal. 7), took the same view as the Madras High Court, but in two cases (2 C. W. N. 750 ; 7 C. W. N. 11) it maintained following the English doctrine that ordinarily mere registration would not of itself operate as notice, though under certain circumstances it could

Discuss whether registration of a document operates as notice to a subsequent transferee ? B L. 1931 (Jan.) 1930 (Jan.) 1929 (Jan.) 1928 (Jan.) 1925 (Jan.) 1923 (July.) 1919 (Jan.) 1910 (Jan.)

Is Registration notice ? 1910 (July.) All. 1896.

Discuss the law as laid down in *Tilakdhari* v. *Khedan Lal.* B. L. (Int.) 1924 (Jan.)

operate as such. The Judicial Committee, after reviewing all the Indian decisions on the subject, came to approve of the latter Calcutta view (in 2 C. W. N. 750 & 7 C. W. N. 11) in the case of *Tilakdhari Lal* v. *Khedan Lal,** and held that the question whether registration is or is not notice is not one of law, but of fact, depending upon the facts and circumstances of each individual case.

Write a short note on the question how far registration operates as notice. B. L. (Int.) 1927 (July.) 1931 (Jan.)

In one Calcutta case† however the obligation to make a search in the Registration Office was held to be almost imperative; consequently an omission to do so was considered to constitute sufficient negligence to set the doctrine of constructive notice in operation. The Legislature has now realised that if the question be left to depend on the facts of each individual case, it would lead to much perjury and litigation and that as in this country the system of registration has been generally applied, it would be defeating one of the primary objects of registration to say that registration is not to operate as notice. So now an express provision has been made declaring that

* 47 I. A. 239=48 Cal., 1=32 C. L. J. 479=25 C. W. N. 49 (P. C.)

† In *Magniram* v. *Mehdi Hossein*, 31 Cal., 95 (at p. 102,) a certain property being under a *registered* mortgage, a subsequent purchaser of it was denied the position of a purchaser *without* notice on the ground that if this purchaser had made *reasonable* enquiry, he could have become aware of the existence of the prior mortgage. Similarly, in *Mahomed Ibrahim* v. *Ambica Prasad*, 39 I. A., 68 at p. 82, there is an observation of the Judicial Committee which obliges a man to take the ordinary precaution of searching the District Register in order to steer clear of a charge of *abstention* and *negligence*. In a subsequent case before the Judicial Committee Lord Haldane made an unqualified observation to the following effect,—"The second mortgage was duly registered and the first mortgagee must be taken to have had notice of it", see *Hetram* v. *Shadiram*, 40 All., 407 (P. C.) at p. 410.

registration of an instrument relating to immoveable property amounts to notice of the instrument *from the date of the registration* and thereby all controversies over the matter have been set at rest.

Registration is notice only where the transaction *is required to be registered.* In cases where registration is not *compulsory*, but is only *optional*, the mere fact of registration constitutes no notice; and in such cases the dictum of *Tilakdhari's* case applies. Registration is notice as "from the date of registration", and in case of property extending beyond one sub-district or in case of registration by the Registrar of a district or of a Presidency-town under sec. 30 (2) of I. R. Act, as from the date on which a memorandum of registration in the District or the Presidency Office is filed in the office of the local sub-registrar. For registration to operate as notice three other requisites have to be fulfilled, *viz.*, (i) registration has been effected or completed in accordance with the provisions of the Registration Act, (ii) necessary entries have been made in the books of the Registration Office under sec. 51 of the Registration Act, (iii) the necessary indexes have been prepared under sec. 55 of the Registration Act to facilitate search.

Notice affects whom? Purchase with notice only affects the conscience of the person who had notice. But once the purchase is made *bona fide* for consideration without notice, law will give protection to all subsequent transferees, whether with or without notice, because a *bona fide* purchase purges away the equity and permits transmission of the property free from the doctrine of notice; see *Dayal* v. *Jivraj*, 1 Bom. 237.

A person purchases for value with notice from one who bought without notice: Is the 2nd purchaser safe? 1920 (July.) —Yes;

Explanation II.—**Possession is Notice**: Explanation II has been added to the definition of "Notice" to make the factum of possession operate as notice (Cf. 25 All., 366 ; 16 Mad., 148 ; 8 Cal. 597). In consequence of this *explanation* an intending purchaser of a piece of land will be said to have constructive notice of a third party's claim to that land when that third party is in possession thereof instead of his vendor. The reason of the rule is that it is considered unreasonable that a person entering into a transaction regarding immoveable property should be in a position to ignore the question of possession or should neglect to inquire into the nature of the possession or the title of the person who is in *actual* possession of such property, if he is not the person with whom he is dealing. It should be noted that notice here is not extended to possession which is merely of a *constructive* nature, as it will be too much to expect of a man to find out every possible person who, though not on the spot, is operating on it from behind. Therefore, possession to operate as notice must always be *actual* possession. Comp. this *Explanation* with *Illustration* 3 to sec. 27 (b) of the Specific Relief Act.

Can knowledge or information obtained by a Solicitor or Muktear in any case bind the client?—Yes; B. L. 1910 (Jan.)

Explanation III.—**Notice through Agent as constructive Notice: The Doctrine of Imputed Notice**: This explanation makes *notice to an agent* operate as constructive notice to the principal. Cf. sec. 229 of the Ind. Contract Act. The principle of this rule is based on the maxim, "*Qui facit per alium facit per se*", i.e., he

who does by another, does by himself. The *Explanation* imposes certain limitations on the general rule that the knowledge of the agent is the knowledge of the principal. In the first place such knowledge should be acquired by the agent while he is acting *on behalf of* the principal and *in the course* of business he is employed in, and the fact brought to his knowledge must be material to the business in hand. If the notice is obtained while the agent is not acting on behalf of the principal and not in course of the business in question and the factum of notice is not material to the business in hand, his knowledge will not bind the principal. An agent's knowledge will not operate to the prejudice of the principal also where the agent *fraudulently* conceals the fact in question from the principal, and the other side, imputing notice to the principal acts in collusion with the agent or knows of the agent's fraud, and stands by. The case of *Raja Gokul Das* v. *Eastern Mortgage Agency & Co* * is a good illustration of the above rule. The Mortgage Agency Company, who were the puisne mortgagees, employed an articled clerk of a solicitor to complete a mortgage transaction. The articled clerk previously took part in proceedings which ought to have put him on an enquiry with respect to the claims of a prior mortgagee, Gokul Das ; this was construed as notice to the principal Company.

B. L. (Int.) 1919 July.

The concluding portion of the repealed definition of *notice* which related to *notice through an agent* ran thus :—

* 10 C. W. N. 276.

"When information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, sec. 229" This definition was considered defective because the words, "given to or obtained by his agent" used in the definition suggest that the rule is restricted to the facts of which the agent has actual knowledge or express notice (*Vide* observations of Pontifex J. in 4 Cal., 897). The reference to sec. 229 of the Ind. Contract Act does not extend the scope of the definition. That section merely provides that in order that notice to an agent should be notice to a principal it must be given to, or the information must be obtained by, the agent in the course of business transacted by him for the principal. According to a well-established principle the general rule is that an agent stands in the place of the principal for the purpose of the business in hand ; therefore, his acts and knowledge should be considered as acts and knowledge of the principal. As observed by the Judicial Committee in *Rampal Singh* v. *Balbaddar Singh* (29 I. A. 20 : 25 All., 1) "it is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or, (in other words) the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings." Likewise, it has been held in *Mohori Bibee* v. *Dhurmodas*, 30 I. A. 114, that the agent stands in the place of the principal for the purposes of the transaction, and his acts and knowledge are the acts and knowledge of the principal. If notice to the agent, whether actual or constructive, is not made notice to the principal, notice would be avoided in every case by employing agents, see *Berwick & Co.* v. *Price*, (1905) 1 Ch. 32.

"It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the

Lispendens as Constructive Notice : In England, formerly, *Lispendens* was itself regarded as good notice, but by a recent enactment (Conveyancing Act) the law has been altered. Now, *lispen-*

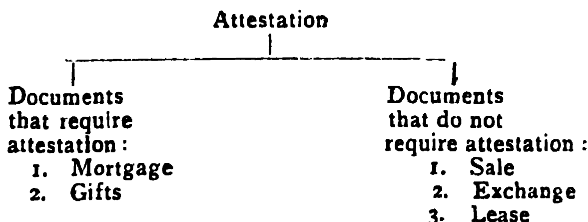
dens will not bind a purchaser or mortgagee unless express notice is given thereof. Lord Cranworth has thus observed in *Bellamy* v. *Sabine* (1 De G. & J. 566): "It is scarcely correct to speak of *lispendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. The language of the Court is that *lispendens* is implied notice to all the world; I confess I think that is not a perfectly correct mode of stating the doctrine." If *lispendens* could be held as implied notice to all the world, the result would be that even a stranger to a suit will be supposed to have constructive notice of every fact appearing in it, but that is rather absurd; because there is an infinite number of suits and an ordinary man cannot be expected to have such vigilance as to take notice of all of them and thereby set the doctrine of notice against himself. But a *lis*, it will be seen hereafter, can affect even a stranger to a suit though not exactly on the ground of notice; see sec. 52, *infra*. It affects one, not because it amounts to notice, but because the law does not allow litigant parties to deal with the properties in dispute pending the suit so as to prejudice their opponents (1 De G. & J., 566). In short, *lispendens* is founded not upon the doctrine of constructive notice but upon the broad principle that otherwise there would be no finality in litigation. [See 33 Bom. L. R. 1123.] But it should be noticed that whether *lis pendens* be based on the doctrine of constructive notice or, on the principle of finality in litigation, the result is the same, inas-

doctrine of notice:" Develop. B. L. (Int.) 1910 (July.) 1915 (July.) All. 1922 All. 1926 (Ext).

much as the intended transfer is fettered either way.

How is the term "attested" now defined by the amending Acts of 1926 & 1927. What difference has it made in the law in regard to attestation? B. L. (Int.) 1929 (Jan.) All. 1927 (Ext.)

Attestation : The following definition has been added by the Transfer of Property (Amendment) Act (xxvii of 1926,) as amended by Act x of 1927 : "Attested," in relation to an instrument means and *should always be deemed* to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant ; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.



What are the essentials of a valid attestation ? B. L. (Int.) 1931 (Jan.)

N.B. : The words in italics above show that this definition is retrospective [53 C. L. J. 326 ; 1930 A. L. J. 289]. For the case-law on the subject, *vide* under sec. 59, *post.* Now, (1) an attesting witness need not witness the actual execution of the deed,

inasmuch as he can attest on the ackowledgment of execution by the executant *himself*, (2) all the attesting witnesses need not attest at the *same* time. (3) each witness must attest in the presence of the executant.

Recapitulation: We have already seen that this Act deals with a special branch of transfer, *i.e.*, transfer *inter vivos*; but it does not contain the whole law on the subject; it is a supplement to certain other Acts relating to transfer of property. It completes the rules of Hindu, Mahomedan and Buddhist laws of transfer yielding to their superiority in case of difference on certain points: (Cf. Ch.'s ii and vii). It has no retrospective effect, and has to harmonise itself with the laws that existed before it.

Discuss—"T. P. Act is not a complete Act." (28 C.L.J. 77).

Sec. 4. The chapters and sections of this Act which relate to contracts, shall be taken as part of the Indian Contract Act, 1872: and sections 54, paras ii and iii, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908,

CHAPTER II.

GENERAL RULES OF TRANSFER OF PROPERTY BY ACT OF PARTIES.

Sec. 5. Meaning of "Transfer of property." *Transfer of property*, means an act by which a *living* person conveys property, in present or in future, to one or more other *living* person or to *himself** or to himself *and one or more other living persons.*

Define "Transfer of property." B. L. (Int.) 1923 (Jan.) 1924 July 1925 (Jan.) 1928 (Jan.) 1929 (Jan.) All. 1927, Int.

* The words "or to himself" been have added in 1929.

In this section "living person" includes a company or association or body of individuals, *whether incorporated or not*, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.*

Essentials of valid, transfer. B. L. 1909.

From the above definition it follows that the property as well as the transferor and transferee must be *in esse* at the date of the transfer. Under this section, as it stood prior to 1929, *a* man could not convey his property to himself *alone*, as in that case there would be no change of ownership : but the law has since been amended (*vide* the Foot-note), and the effect of this amendment, evidently, is that a man can now transfer a property *to himself* ; but that would be meaningless unless the amendment be taken to cover only the case of a transfer by a man in one capacity, to himself in another capacity, e. g. when a man makes a transfer in his capacity as an executor to himself in his private capacity, or where a person creates a trust and appoints himself a trustee. This the Legislature should have made definite by using suitable expressions.

A man can, however, convey property to himself *together with* other persons ; thus, for example, when he is a member of a corporation, or of a firm and when the corporation or the firm becomes his transferee, he practically transfers the property to himself together with others.

* **This paragraph has been added in 1929.**

The expression "living person" in the section includes corporated and incorporated companies, registered and unregistered associations, partnership firms and so forth. So, now all these bodies can effect transfers of property in their business, collective or firm names. A transfer which is valid being made in favour of a person *is esse* is not invalidated by reason of the fact that some *ultimate* interest is reserved by it in favour of some unborn persons. See secs. 13, 14 & 20

N. B.—It should be noticed that like the word "property", the term "transfer" has also been used in the Act in its widest and most generic sense as comprehending all the species of contract which pass real rights in property from one person to another (13 All., 476). It implies both investitive and divestive acts. The divestiture of right may be in respect of the entire interest of the transferor (as in the cases of sale, gift and exchange) or it may be a limited and restricted one (such as mortgage or lease).

N.B. We have seen above that the first essential requisite of a valid transfer is the existence of the subject-matter on which the transfer can operate, or in other words, the section does not contemplate a transfer of *future* or non-existent property. So the property, whether moveable or immoveable, if the intended transfer in respect of it is to be sustained, must exist at least *potentially* as the property of the transferor. If a non-existent property is made the subject-matter of a transfer, the transaction cannot operate as an immediate alienation, but if made for good consideration may be valid as a contract capable of enforcement when the the non-existing property comes into existence, or in other words, "the contract to assign which was hitherto a mere *executory* one then becomes a complete *executed* assignment." Thus, in *Holroyd* v. *Marshall*, 10 H. L. C. 191, an assignment of machinery to be set up in future was held to be valid, and

"A conveyance of non-existent property may, when made for valid considerations, be valid as a contract" Discuss.

B. L. (Int.) 1923 (Jan.) 1925 (Jan.) 1928 (Jan.)

actually operative in respect of the machinery subsequently added.* But this potentiality for future existence is of different shades in different cases, and to avoid complication of disputes, the policy of this Act has been to distinctly exclude certain properties, which are too vague and difficult of identification from the categories of transferable property, and they are mentioned below. *Vide* under the caption "Mortgage of non-existent property in Ch. IV, *post.*

Explain and distinguish the different kinds of transfer of immoveable property that can be effected under the T. P. Act. B. L. (Int.) 1928 (July.)

State what kinds of transfer are contemplated in the T. P. Act. 1929 (July.)

The Act contemplates, the following kinds of transfer, (*i*) Sale, (*ii*) Mortgage, (*iii*) Lease, (*iv*) Exchange and (*v*) Gift. Sale is an out and out transfer of ownership in a property. Exchange and Gift resemble Sale in this respect, but differ from it as regards the matter of consideration for the transfer. In sale, the consideration is a *price* (in money) paid or promised or partly paid and partly promised. In Exchange, the consideration is not *money*, but another thing. In Gift there is no consideration. Mortgage is a transfer of a limited interest in property, *Vide* under "Recapitulation" under sec. 58. Lease is a transfer of the right of enjoyment, *Vide* under s. 105, *infra.*

What property may be transferred and what not. B. L. 1886. B. L. (Int.) 1915 (July) 1929 (Jan.) All. 1922.

Sec. 6. Property of *any kind* may be transferred *except as otherwise provided by law.* Certain rights and interests, however, cannot be transferred, and they are mentioned in clauses (*a*) to (*i*) below.

What things are excluded from the category of property by the T. P. Act? B. L. (Int.) 1912 (Jan.) 1922 (July.) Mad. 1906. All. 1905.

(*a*) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature. It should be noted this chance, expectancy (*i.e.*, *spes successionis* or mere possibility of succession) is not *property*, but is a mere contingency.

There is some distinction between the reversioner's right after the cessation of a widow's interest and the right of a

* See *Performing Right Society* v. *London Theatre*, (1922) 2 K. B. 433 : also (1924) A. C. 1 ; A. I. R. 1931 P. C. 203.

reversioner who takes on the termination of life-estates. The widow may under legal necessity dispose of the property and defeat the reversioner's right. But the holder of a life-estate cannot deal with property to the prejudice of the ultimate reversioner. In the former case the reversioner's right is *a mere possibility* depending upon the act of the widow: in the latter case it is *certain* and vested. "A Hindu reversioner has no right or interest *in præsenti* in the property which the female owner holds for her life. Until it vests in him on her death he has nothing to assign, relinquish or transmit to his heirs His right is mere *spes successionis*," *Amrita* v. *Gaya Singh*, 45 Cal., 590 (P C.), *s.c.* 27 C. L J., 296. Even a contract to sell such an expectant interest is void, *Annada Mohan* v. *Gour Mohan*, 28 C. W. N. 713=40 C. L. J. 10, P. C. Cf. 48 All., 637. Though a transfer of his interest by a revesioner is void he may by becoming a party to a compromise and by taking benefit thereunder, be estopped from claiming as a reversioner, 48 Cal., 536, *s. c.* 33 C. L. J. 457.

The estate of a Hindu widow is neither a fee, nor an estate for life, nor an estate tail, *Rangasami* v. *Nachiappa*, 23 C. W. N. 777 (P. C.).

(*b*) A mere right of re-entry for breach of condition subsequent; (but such a right can be transferred to the owner of the property affected thereby.

(*c*) An easement apart from the dominant heritage).

Enumerate the kinds of property which are not transferable under the T. P. Act. Give reason for the prohibition in each case. B. L. (Int.) 1917 (Aug.) 1918 (Aug.) 1920 (Jan.) 1928 (Jan.) 1929 (Jan.)

Therefore, the owner of a dominant tenement having a right of way over a servient tenement cannot, without parting with his own property, merely transfer his right of way.

N.B.—From this clause it has been inferred that an easement does not come within the scope of the Act until it is created, and the Act does not regard the creation of an easement as a tranefer of property, 20 C. W. N. 118.

(*d*) An interest in property restricted in its enjoyment to the owner personally, *e.g.*, hereditary, priestly office, inalienable *raj*.

What are the exceptions to the general rule that property of any kind may be transferred 1918 (Jan.)

N.B.—Note that "widow's estate" does not come under clause (*d*) as the transfer of such an estate may hold good during the life-time of the widow.

[Q. A is given under the will of B, her husband, the *personal* right of residence at No. 4, Blank Square. A desires to sell her right of residence in order that she may live at Benares. Is A entitled to sell such personal right? B. L. (Int) ; 1928 (July)— *Ans* : No.]

(*dd*) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.*

Right to future maintenance : This new clause (dd) makes a right to *future* maintenance, in *whatsoever manner arising, secured or determined*, altogether inalienable. A right to receive maintenance is a *personal* right, although any particular property or the income thereof may be charged with it. It is in accordance with public policy that these rights which are generally created for the maintenance or personal enjoyment of a qualified owner (*e.g.* a Hindu female) ought to be inalienable ; but in some cases it has been held that if the amount of maintenance is fixed by an agreement or by a decree, it can be assigned (see 5 Bom. 99; 38 Cal., 13). Although an agreement or a decree would make such right definite, it is nevertheless a right created for the personal benefit of the qualified owner and should not be alienable. It will be seen that sec. 60 of the C. P. Code which protects a right to maintenance from attachment and sale does not make any exception in the case of maintenance fixed by agreement or decree. The above reasoning, however, does not apply to arrears of maintenance

* Added in 1929.

which have accrued. Therefore, *past* maintenance is excluded from cl. (dd) which is restricted to *future* maintenance only. The words "in whatsoever manner arising &c." make it clear that a right to maintenance, whether created by *contract* between the parties or by an *order* of the Court, is alike non-transferable.

(*e*) A mere right to sue. The clause is intended to keep down litigation and to prevent trafficking in litigation, or in the technical language to discountenance Champerty and Maintenance.

"A mere right to sue is not transferable. Explain with illustrations" B. L. (Int.) 1927 (Jan.)

A right to sue is a remedial right which arises (*a*) from breach of contract or (*b*) from a tortious act invading one's right to property or infringing some personal rights. When the property is transferred, the right of suit relating thereto as an incident to the property passess along with it (sec. 8) but a mere right to sue dissociated from the *property* itself is virtually making a commodity of a litigation, and has accordingly been made non-transferable.

A claim for past mesne profits is a mere right to sue and therefore cannot be transferred, 38 Mad., 308 ; 3 Pat. 575, but a right to mesne profits under a decree is assignable, 18 C. W. N. 450 ; 44 Mad., 539. A right of pre-emption is a purely personal right which cannot be transferred to any one except the owner of the property affected thereby, *Jasudin* v. *Sakharam*, 36 Bom., 139. Similarly, the right of a Hindu widow to maintenance and residence is a personal right, and is, as such from its very nature, non-transferable, 5 W. R. 111 ; 40 Mad., 302. Cf. 53 I. C. 587 ; 12 C. L. J. 146 ; 38 Cal. 13.

Discuss whether (*a*) the right of pre-emption under the M. L. or (*b*) the right to future maintenance of a Hindu widow is transferable. 1918 (Jan.)

A claim for damages for breach of a contract *after breach* is not an actionable claim, but is a "mere right to sue" within the meaning of sec. 6 (*e*) of the T. P. Act, and therefore cannot be transferred.* A right to sue an agent for

* *Abu Mahomed* v. *Chunder*, 36 Cal., 345=13 C. W.N. 384. Also see *Jewan Ram* v. *Ratan Chand*, 26 C. W. N. 285.

accounts is likewise not assignable, 28 C. W. N. 894 ; 40 C. L. J. 79.

Q. A mortgagee has a right of suit against the mortgagor. Can this right be transferred ? Give reasons for your answer, [B. L. (Int), 1927 (Jan.)]—**Ans** : Mortgagee's such interest is property and is something more than a mere right to sue and is therefore not within the prohibition of this clause.

(*f*) "A public office or the salary of a public officer.

(The principle underlying this clause is that as each office requires individual capacity, public interest will suffer if a public office were allowed to be transferred to inferior men, 26 C. W. N. 396. As regards public salary it cannot be transferred by *act of parties*, but it can *be attached* under O. 21, r. 48, C. P. C. ; see p. 3 under "Scope of this Act."

(*g*) Stipends allowed to military, air-force and civil pensioners of Government as well as political pensions.

(*h*) (1) "No transfer can be made in so far as it is opposed to the nature of the interest affected thereby" [All. 1922, 1926]. We have seen that interest restricted to an individual personally [described in Cl. (*d*)] is such an interest which cannot possibly be transferred. So, there are other things, which from their very nature is non-transferable. Thus, things commonly called *res communes*, *i.e.*, things of which no one, in particular, is the owner and which all men may use, are not property and therefore cannot be transferred. *Res nullius* (things belonging to nobody), such as air and water, being incapable of appropriation

are excluded from the category of transferable property. *Res extra commercium* (things thrown out of commerce, *e.g.*, property dedicated to a deity though originally ranking with transferable property cannot also be transferred.*

N.B. The right of the pujari of a Hindu temple to take a share of the offering is *res extra commercium* ; 43 Cal., 28 =19 C. W. N., 580. A *pala* of the Kalighat temple is, however, transferable to a co-shebait by custom, *Mahamaya* v. *Haridas*, 42 Cal., 455=20 C. L. J. 183.

What is the law relating to the transferability of the Kalighat Temple Palas as laid down in *Mahamaya* v. *Haridas*? B. L. Int. 1924 (Jan.)

(*h*) (2) Transfers cannot also be made for unlawful objects or considerations and to persons legally *disqualified* to be transferees, (*vide* p. 34 and sec. 136, *infra*).

As to what is an *unlawful* object and consideration, see Sec. 23 of the Contract Act ; that is, it should not be (*a*) forbidden by law, (*b*) nor defeating any provision of law, (*c*) nor fraudulent, (*d*) nor injurious to others, (*e*) nor immoral ; thus, a property cannot be transferred on condition that the transferor will be allowed to have illicit connection, with the transferee's wife. This clause however does not abrogate the equitable rule that when a transaction is entered into for an unlawful object and *that object is accomplished* a Court of Equity will not intervene to set aside the transaction.

(*i*) The effect of this section is not to validate the transfer of a property which is not transferable under other laws. Thus, (1) a non-transferable right of occupancy cannot be transferred : (2) A farmer of an estate making default in payment of revenue cannot transfer his interest : (3) Similarly

* 31 C. L. J. 37=24 C. W. N. 309.

the interest of a lessee of an estate under the management of a Court of Wards cannot be transferred.

Discuss briefly in the light of *Lala Achal Ram's* case how far the Eng. laws of Maintenance and Champerty are of force as specific laws in India. B. L. (Int.) 1914 (Jan.) 1916 (Jan.) 1927 (Jan.)

Maintenance and Champerty : *Maintenance* is the prosecution of a suit of another in which one is in no wise interested : *Champerty* is the maintenance of a suit in consideration for an illegal bargain or for a share of the proceeds of the suit. Under the Common Laws of England such an officious intermeddling in another man's suit with a view to carrying on a litigation or making an illegal bargain therefrom has been severely condemned. Clause (*e*) of Sec. 6 is but a mere re-iteration (in a modified form) of the English rule, the whole object whereof, as we have already noted is to keep down speculative litigation. Under the English law the doctrine has been applied in a more comprehensive and unqualified fashion ; but in India its application seems to have been much narrowed down by prohibiting the transfer of a *mere right to sue*. A mere right to sue is an altogether different thing from a right to property. So, in India the mere prospect of involving one in litigation does not at all vitiate the transaction. The Common Law too lays down exactly a similar rule ; but it seems to be more rigorously applied inasmuch as it prohibits dealing with even *properties* of doubtful ownership and not to speak of mere right to sue. Thus, in *Lala Achal Ram* v. *Kazim Hossain*, 27 All., 271, one A, who had a very good claim to property, being unable to vindicate his right against his adversary, sold it to Kazim for a nominal price. In a suit by Kazim, the Judicial Committee held that there was nothing contrary to public policy in making such profits and that it was not gambling in litigation. The real test in such cases is whether a transaction is a *bonafide* one with an honest purpose to promote self-interest or whether it is the outcome of mere speculation in litigation. Moreover, under the statutes of England, maintenance and champerty are indictable offences and are punishable as such. Though in India those statutes were not

Discuss the law of

in force as specific law, still the English doctrine was, in some of the earlier cases, applied on the ground of public policy. Consequently, it was maintained in an early case (13 B. L. R. 500) that though the English law as to maintenance is not in force as specific law in India, still contracts involving it are invalid being opposed to public policy ; but according to recent judical opinion, the English law as to maintenance and champerty is not at all applicable to India —nay, even on the ground of being contrary to public policy ; see *Lala Achal Ram's* case ; also *Raja Rai Bhagawat* v. *Debi Dayal*, 35 Cal., 420 (P. C) ; s. c. 7 C. L. J., 335. Cf. *Venkata Subhadrayamma* v. *Poosapati*, 29 C. W. N. 57, P. C.

Champerty as administered in Br. India. B. L. (Int.) 1927 (Jan.)

Q. 1. Three brothers A, B, C, made a partition of their property. A lived saparate, but B and C continued joint. After B's death leaving a widow and a daughter, A and C entered into an agreement regarding the estate of the deceased. Subsequently A predeceased B's widow and the son of A sued C's son for his share under the agreement— Did the agreement pass any interest to A and would A's son succeed in the suit ?—Prior to B's widow's death, A and C had only a presumptive reversionary interest in the property, so nothing could pass by the agreement.

Whether the interest of a Hindu reversioner expectant upon the death of a Hindu female can be transferred ? —No. B. L. (Int) 1912 (Jan.) 1915 (July.) B. L. 1910 (July.)

Q. 2. A Hindu widow is in possession of her husband's estate. Her daughter's son X sells his reversionary interest in this estate to Z. Ten years later the widow dies and X succeeds to the estate. Is the sale in favour of Z valid, and can he obtain possession of the property transferred by suit ? —No, as it is a mere *spes successionis* or a *mere possibility* of succession. See also Sec. 43, *infra*.

Sec. 7. Every person *competent to contract* (sec. 11 of the *Contract Act*) and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property, either wholly or partly, and either absolutely or conditionally.

Person competent to transfer. B. L. (Int.) 1916 (July.) 1929 (July.)

Discuss the validity of sale in favour of a minor. B. L. 1910 (July.) All. 1922.

The section tells us who is competent to effect a transfer. Note that the transferor should be *competent to contract.* This contractual competency is not predicated of a transferee. All that is said in sec. 6 (h) (2) is that a transfer cannot be made to a *person legally disqualified to be a transferee* (p. 31). Thus, the disability which attends the making of a transfer does not attach to the acceptance thereof.* Consequently, it has been maintained in *Hari Mohan* v. *Mohini*, 22 C. W. N. 130, that there being nothing in the Act to nullify a transfer to a minor, a minor can be a mortgagee, if there be no covenant for him to perform; see also 40 Mad., 308 (F. B.) and 33 All., 657. In an early Madras case (33 Mad., 312), it was held that there can be no valid sale to a minor as a sale implies a contract, and a contract by a minor according to the rule of *Mohori Bibi's* case is void. But this Madras case has been overruled by the Full Bench decision of *Raghava Chariar* v. *Srinivasa*, 40 Mad., 308 (F. B.). So, now, a minor can be a *vendee* provided the sale does not impose any obligation upon him. A minor can take a gift *if not onerous*: see sec. 127 below. Similarly, there may be a valid transfer in favour of a lunatic. It is needless to mention that a minor, being incompetent to contract, cannot be a transferor at all. The word *Person* in the section includes a juridical person.

Is a minor competent to transfer? 1919 (Jun.)

The essentials of a valid transfer. B. L. 1909.

Recapitulation: The essentials of a valid transfer are shortly these: (1) The property, as well as the transferor and transferee must be in *esse*; (ii) The transforor and the transferee should not be *exactly* identical; (iii) The property should be transferable under sec. 6; (iv) The transferor should be a person *competent to contract* and the transferable interest must belong to him, or at least, he must be authorised to dispose of property not his own (as in the case of the *karta* of a Hindu joint family); (v) The transferee must be capable of holding property and must not be a person legally disqualified to receive a transfer; (iv) The necessary formalities (registration etc.), if prescribed must be gone through.

Sec. 8. A transfer of property, unless a contrary intention is expressed or implied, passes forthwith to the transferee all the interests which the transferor is *then* capable of passing in the property, and *in the legal incidents thereof*; but when a debt is transferred the arrears of interest accruing before the transfer do not by implication pass to the transferee.

Operation of transfer.

This section is really a legislative recognition of the legal maxim, "The accessory follows the principal" (*res accessoria sequitur rem principalem*), which in its turn, is derived from the Roman law. It signifies that when a man acquires a property, he, by the very fact of his acquisition *ipso jure*, becomes owner also of all that appertains to it as accessory. Before the English Conveyancing Act (*i.e.* before 31st December, 1881), it was necessary to insert in a deed of transfer even the minutest details and incidents of property which would not pass with the property unless so mentioned, and the Conveyancing Act of 1881 introduced a change in the law. The T. P. Act, following this English Statute, extends the ordinary operation of a transfer of property to all the accessory rights attaching thereto. Unless *a different intention is expressed*, the effect of a transfer is to exhaust all the interests which the transferor is capable of passing in the property. For illustration, rights of easement pass along with the transfer of the land; all easements, however, do not pass, but only such as are annexed to the property; the parts of a machine go with it: right to locks, keys, doors etc. follows the transferred house; the owner of the land has a right to the title deeds; the trees or crops standing on the land go with it; the securities of a debt go along with it and so on. Cf. 42 Cal., 56=20 C. L. J. 368 (P. C.).

"The accessory follows the principal." Explain and illustrate the principle by reference to the ordinary operation of transfer under T. P. Act. B. L. (Int.) 1924 (July.) 1925 (July.)

N.B. A Zeminder is the proprietor of the soil, a tenant is but the owner of the surface of the soil; therefore while

a transfer of the Zemindari carries with it the right to minerals, the transfer of the tenancy carries no such right. When the Zemindar grants a tenure in lands within his Zemindari the grant in the absence of clear terms to the contrary, does not carry with it the rights in the sub-soil minerals, *Raghunath Ray* v. *Durga Prosad*, 47 Cal. 95 (P. C.). Also see. 14 C. W. N., 746 ; 36 I. A. 167 : 39 Cal. 696 ; 44 Cal., 585. 46 C. L. J. 307 ; 48 C. L. J. 268 (P.C.)

Oral transfer.

Sec. 9. Oral transfer is allowed in this country. A transfer of property may be effected *without writing where writing is not expressly required by law.*

N.B.—As parol contracts are allowed in this country, it follows as a necessary corollary that oral transfers should be allowed. In the Hindu and Moslem systems of jurisprudence transfer could be effected by delivery of possession, but now in most cases that mode has been superseded by writing, *vide infra.*

What transfers of property are expressly required to be made by writing and registration ?

In this section attention should be paid to the portion in italics, (*i.e.*, writing and registration will not be necessary unless required by law). Thus, some of the cases where writing and registration are expressly required by law may be enumerated as follows : (*a*) Sale of immoveable property of the value of Rs. 100 or upwards, or of a reversion or other intangible thing, (sec. 54) : (*b*) All cases of simple mortgage, and other mortgages securing Rs. 100 or upwards, (sec. 59) : (*c*) Leases from year to year or for more than one year, or reserving a yearly rent, (sec. 107) : (*d*) Gifts of immoveable property, (sec. 122).

Writing (though not registration) is necessary for the transfer of an actionable claim.

[*N.B.*—Section ten and the seven following sections condemn an attempt to shackle free disposition or enjoyment of property or to prevent its circulation. You cannot tie up a property by putting restrictions on your transferees and prevent them from enjoying the transferred property in any way they like].

Quote the rules of T. P. Act intended to prevent attempts to shackle free disposition of property (noting exception to the rule). Mad. 1907. Conditions restraining alienation are void. B. L. 1907.

Sec 10. Where property is transferred subject to a condition or limitation *absolutely* restraining the transferee or any person claiming under him from parting with, or disposing of, his interest in the property, the condition or limitation is void.

The underlying principle of this section is very clear. Power of alienation is a legal incident of property. " A right of alienation," says Dart, "is incidental to and inseparable from the beneficial ownership of property." Consequently, any restriction on such power or right must naturally be repugnant to the very notions of property, and therefore unallowable. But when a restrictive condition does not amount to an *absolute* prohibition under this section, it may be upheld. That is, though you cannot *absolutely* restrain your transferee from alienating his interest, still you can impose *partial* restraints on his power of free disposition, provided you do not thereby materially interfere with his freedom of enjoying his property according to his will. For example, A sells Blackacre to B. One of the conditions of sale is that should B ever wish to part with the property he would sell it to A. Is B entitled to sell the property to C without any reference to A ? [B. L. 1912, July ; All. 1927, Ext.] A covenant to reconvey the property to the transferor or to secure him the right of pre-emption, *i.e.*, to give him an opportunity for buying the property, is valid, as it does not amount to an absolute prohibition. Therefore, B should first make a reference to A. But, such a covenant cannot have effect for an indefinite period. If the covenant for pre-emption should prejudicially affect the power of free

"A *partial* restraint against alienation is not bad but an absolute one is" Explain with illustration. B. L. (Int.) 1926 (July.) 1927 (July.)

disposal, it is void. Thus, in *Rosher* v. *Rosher*, 26 Ch. D, 801, the transferee was put under a condition that he should first offer the property to the transferor's wife at a *fixed price*, much below the real price, the condition was held to constitute an *absolute* restraint on alienation. Similarly, a stipulation in a sale deed that the vendee can sell back the property to the vendor only, and to no one else, is more than a mere partial restraint, and therefore invalid. But a condition that the purchaser should not alienate the property in favour of a particular person, who is the vendor's enemy, is only a *partial* restraint and therefore may be allowed.

Q. 1. A made an *absolute* gift of some lands to his three sons, and directed them not to sell the property but only to enjoy the profits of the same. One of the sons afterwards sold his share to a stranger. Will the purchaser be competent to recover possession of the share purchased by him? B. L. (Int.), 1916 (July) :—**Ans** : Yes ; the direction not to sell is invalid.

Q. 2. A transfers a farm to B subject to the condition that if B endeavours to transfer or dispose of the same, his interest in the farm will cease. Is the condition valid? (B. L. Int., 1924 Jan),—**Ans**. : No.

Two exceptions to the above rule. B. L. 1901.

Exceptions :—There are two exceptions to the above general rule :—(1) One is in favour of a lessor when the condition is for his (lessor's) benefit or for the benefit of those claiming under him. The lessor can always fetter his lessee's liberty of alienation. [N. B. read along with this the notes under the heading "Forfeiture" under sec. 111] ; (2) The other exception is for the benefit of a married woman (not being a Hindu, Muhammedan or Buddhist) so that she shall have no power, during her marriage, to transfer, or charge the same or her beneficial interest therein. So it is quite pos-

sible to restrain a transferee, who is a Parsi, Jewish or Christian married woman from transferring her interest during her coverture.

Ex: A, a Christian makes a gift of his house to B, his wife, with a condition that she shall not have power during her marriage to charge the same, (All. 1926. Ext.); the condition is valid.

Sec. 11. Where on a transfer of property an interest therein is created *absolutely* in favour of any person but the *terms of the transfer* direct that such interest shall be applied or enjoyed in a particular manner, the transferee is entitled to receive and dispose of the property as if there were no such direction. **Restriction repugnant to the nature of the transfer void.**

Where a direction has been made (by the terms of the transfer) in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of breach thereof.*

Section 10 invalidates any *general* restraint against alienation. Section 11 invalidates restrictions imposed on free enjoyment of the interest created by the transfer after it has become *absolute* or *out and out*. Thus, in a deed of gift of a house to a Brahmin, a conditon that he and his heirs should reside there for ever is void being repugnant to the absolute interest created, see 44 Bom. 304 (313). Directions that the transferee should not demand partition or should not collect rent are repugnant to the nature of pro-

* Put in by Act xx of 1929.

perty and therefore invalid hereunder. Section 11 will not be operative unless the transfer is *absolute* and the condition of restriction is imposed by the *terms of the transfer.* Thus, where a man transfers his land to another man reserving a right of residence to himself and the *terms of the transfer* enjoin on the transferee that he shall not have the right to drive away the transferor—will the condition be valid ?—Yes, as the transfer is not made *absolutely.* Again, where the property transferred is already under a charge which is but a a condition, section 11 will not apply as in that case the condition is not imposed by the *terms of* the *transfer.*

"When you give a property to a person absolutely you cannot tell him how he is to enjoy it"—Is there any exception to this rule ? B. L. (Int.) 1927 (Jan.)

The *proviso* contained in the second paragraph of the section is important as it makes an exception from the general rule laid down in the first paragraph of the section, namely that when you transfer a property *absolutely* to a person you cannot any more bind him by a condition that he is to enjoy the property in a particular manner. Because of this *proviso*, it is quite possible for a transferor to give direction to the transferee that for the beneficial enjoyment by the transferor of another property, the transferee is to enjoy the *transferred* property in a particular manner. Thus, A makes an absolute gift of a house to B and directs that B shall not raise it higher so as to obstruct the passage of light and air to A's adjoining house, the direction will be valid under this *proviso.* See *Tulk* v. *Moxhay*, 2 Ph. 774. Again, where A grants a lease of his zemindary to B reserving to himself all the minerals and a few plots of land in the middle of his zemindary for working the mines and storing minerals and directs B to allow passage to his miners to and

from the reserved plots, the direction is binding. Similarly, an owner of two adjoining houses, with a common drainage route, can, while selling one of them, impose a condition on the transferee that he must keep his portion of the drain in proper order, because the direction is "in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property." A condition imposing on the lessee the obligation to clear up jungles, and erect houses may on the same ground be justified. In *McLean* v. *McKay* (L. R. 5 P. C. 327), the conveyance contained a stipulation that a certain land "should never be hereafter sold, but should be left for the common benefit of both parties and their successors" [B. L. (Int.), 1925 (July); 1928 (Jan.).], and the P. C. held that (i) the restriction on sale is invalid, (ii) but the condition for keeping the land for the common advantage of the parties as adjoining owners, is valid. Note however that even the second condition may cease to be enforceable if the character of the property so changes as to render its performance difficult, *Bedford* v. *Trustees* of *British Museum*, 2 M. & K. 552.

Q. *A* sells a plot of land to *B*. There is a covenant in the conveyance that *B* and his assigns will never erect a godown for storing hides on the land. Are *B* and his assigns bound by the covenant ? [Cal., 1930 (Jan.)] *Ans* : Yes ; such a restrictive covenant for the beneficial enjoyment of transferor's own property is quite valid.

"The covenant is enforceable as between

Prior to the amendment of 1929, the proviso contained the words "to compel its enjoyment" which also occurred in sec. 40. Now, this section refers to rights as between a

the covenantor and the covenantee" B. L. (Int.) 1922 (Jan.)

transferor and a transferee while section 40 relates to the rights of *third* parties. As between a transferor and a transferee an *affirmative* covenant is not by itself invalid (S, 11) but judicial opinion maintained that as against third parties, only the *negative* or restrictive covenants can be specifically enforced* (sec. 40). Therefore, the same phraseology is unsuitable for both this section and sec. 40, and amendments have been made accordingly.

Covenant against Partition : All property is presumably partible and an agreement amongst co-sharers imposing restriction against partition is void as against parties not actually covenanting, 6 Cal., 106 ; 31 All. 3. As to whether the parties to the agreement are themselves bound by it, there seems to be a conflict of judicial opinion, but recent opinion seems to hold that such covenants are invalid even against them, 3 C. W. N., 126 ; 28 Cal.. 72 (P. C.) ; 7 Bom., 538.

Condition making interest determinable on insolvency or attempted alienation is void. B. L. 1907.

Sec. 12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to, or for the benefit of, any person, to cease on his becoming insolvent, or endeavouring to transfer or dispose of the same, such condition or limitation is void. [This section does not apply when the condition is with respect to a lease and is for the benefit of the lessor or his representative-in-interest. So the *proviso* to this section runs—"Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him"].

The section may be regarded as an exception to the rule in sec. 31, which permits the incorporation of a condition in a transfer making the transferee's interest determinable on the happening of a contingency. Though you can agree

* See *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403 ; *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. 750 ; also 27 Bom. L. R. 73.

that the transferee's interest should come to an end if a certain event happens, still you cannot say that your transferee will forfeit his interest on his becoming insolvent or attempting to alienate his interest in the property. It may be noted here that on insolvency, the property of the insolvent vests by operation of law in his assignees in bankruptcy; so, if the transferor could determine the transferee's interest on insolvency that law would cease to be operative.

To illustrate the *proviso* let us suppose that there is a condition in a lease that the lesseee should not alienate his interest. But the lessee's interest is subsequently sold in execution and is purchased by a third party : (*a*) Is the condition valid ? (*b*) Can the lessor impeach the title of the purchaser ?—(*a*) Yes ; the condition is valid : (*b*)—No ; as there is no covenant against involuntary alienation or alienation by operation of law, and as no right of re-entry is *distinctly* reserved on the lessee's interest being taken in execution, and as there is no forfeiture clause in the lease, the execution purchaser acquires good title and the lessor cannot impeach it.* But when there is a distinct covenant for forfeiture of the lease upon an involuntary sale, the lessor will have the right of re-entry.†

A covenant in a lease to a company provided that the compay should not assign, under-let, or part with the possession of the leased property. The company having gone into liquidation, and the Official Liquidator having applied for sanction to sell the property, the representative-in-inter-

* *Promode Ranjan* v. *Aswini Kumar*, 18 C. W. N. 1138.

† *Dwarika* v. *Mathura*, 24 C. L. J., 40=21 C. W. N. 117 ; Cf. 20 Cal. 273=19 C. W. N. 1182 ; 43 Mad., 503.

est of the lessors objected to it, but their objection was not allowed and the Official Liquidator was given the permission he sought for, (12 All., 192).

Q. Examine the validity of the following disposition. A transfers a property to B and provides that on B becoming an insolvent, the property shall revert to A ; (Mad. 1914)—*Ans.* Invalid ; sec. 12.

Summary : The following restrictions are bad : (1) restraint against general power of alienation (sec. 10) ; (ii) restraint against free enjoyment, (Sec 11) ; (iii) restraint against compulsory alienation on insolvency, (Sec. (12) ; (iv) direction for accumulation, (S. 17, *infra*).

Transfer for benefit of unborn person when valid.

Sec. 13. Transfer for the benefit of an unborn person : Where, on a transfer of property, an interest therein is created for the benefit of a person, not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property. For example, A transfers his property to B in trust for himself and his wife successively for their lives, and after their death, for their eldest-born son (then not in existence,) for life, and after that for their second son. [All. 1922] Here the interest created for the benefit of the eldest son does not take effect because it does not extend to the whole of A's remaining interest in the property. The section, it should be noticed, means that there might never be such a person as an unborn one who takes only for life ; because, it is an obvious contingency, (as in the above example)

Is the gift of an interest for life only to an unborn child valid ? —No. 1918 (Jan.)

that A might never have a son. Besides, there is another contingency, A might not have a second son or the second son might predecease the eldest one.

N. B.—It is to be noted that under the second chapter of the Transfer of Property Act an interest in property may be created for the benefit of unborn persons provided some prior or intermediate interest is created in that property in favour of a person or persons in existence at the time of the transfer. But when interest in property is sought to be created for the benefit of unborn persons regard must be had to the rules embodied in section 13 and 14. These rules may be set forth as follows :—(*a*) that the unborn persons must be given the entire interest of the transferor in the property ; whatever intermediate interests may be created in favour of living persons, the person then unborn must ultimately take *all that remains*, This rule is analogous to the English law of Real Property which prevents a remainder to the child of an unborn parent from taking effect after an estate for life held by that parent (*b*) that no interest in the property sought to be transferred should reach any unborn person after the life-time of one or more intermediate persons living at the date of the transfer and the minority of that unborn person ; (*c*) that the beneficiary who is not in existence at the date of the transfer must come into existence on or before the expiration of the existing life or lives named by the transferor. The Hindu law on the subject has now been brought into line with this law, *vide post*, pp. 50-51.

In what cases is a transfer for the benefit of a person unborn at the date of the transfer subject to a prior interest created by the same transfer valid? B. L. 1907. 1928 (Jan.)

What are the limitations under which interest may be created in favour of an unborn person ? Is there any difference in the case of Hindus ? B. L. (Int.) 1915 (Jan.) 1918 (Aug.)

Sec. 14 Rule against Perpetuity. No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person *who shall be in existence at the expiration of that period*, and to whom, if the attains full age, the interest created is to belong.

State the rule against perpetuities as contained in S. 14 of T. P. Act. 1913 (July.) 1915 (July). 1916 (July). 1923 (July). 1927 (July). 1931 (July). All. 1922.

State the rules in the T. P. Act. relating to interests created in favour of persons not in existence at the date of the transfer. B. L. (Int). 1923 (Jan.) 1925 (Jan.) July.) Jan.) Mad. 1905

When it is intended to benefit living persons by a transfer there is no limit to the number of successive interests that may be created in their favour. Thus A, B, C D, are all living when a transfer is made by a man in favour of A for life, afterwards in favour of B, C and D, successively for their lives; here all the successive interests are valid as the persons benefited are all in existence at the date of the transfer. But when unborn persons are intended to be benefited, a three-fold restriction is put on the power of the transferor : (1) the unborn person must be given all that remains after the determination of the intermediate interests; sec. 13 ; (2) the interest *must* vest within the maximum period provided by sec. 14; ordinarily, an estate ought to vest in the remainder-man immediately upon the determination of the life-estate, but this section makes a concession and tolerates the delaying of vesting during the minority period of a person unborn on the date of the transfer. (3) the unborn person must come into existence on or *before the expiration of the existing life or lives.* This third condition is intended to prevent the property from remaining in abeyance pending the birth of the intended transferee. It should always be remembered that a property cannot remain without an owner even for a single moment. Also read the portion in small types at page 45.

Example : A property is transferred to B for life and after his death to such son of B as shall first attain the age of 25 years, B having no son on the date of the transfer.

Here the life-estate in favour of B, a person in existence at the time of the transfer is perfectly valid. If a son is born to B, evidently such child comes into existence *at the expiration* of the intervening life-estate. So far it is all right. B's son must attain his 25th year before B's death, otherwise the vesting will be delayed after B's death and such delaying will not be excused, because it will overstep the *minority* period of B's son. Remember that B's son is not a minor during the years 18 to 25.

The nature of the additional period of minority—it is not to be taken *in gross*.

As to the true nature of the additional period of minority after the expiry of living persons up to which valid transfers may be made, the student is advised to read the English case of *Cadell* v. *Palmer*, (1 Cl. & F., 372). In this case the question was raised—"whether in the case of executory devises the additional period of 21 years must *relate to the actual minority* or whether it was a *term in gross*, i.e., a term of 21 years from the death of the last life in being, irrespective of the minority of any particular person ?"—and it was decided that the term is to be taken *in gross.* But the tendency of the latter English cases is to confine the additional period to the minority of the persons intended to take, so that it may be equal to any number of years up to 21 *plus* the term for gestation. In T. P. Act this difficulty has been obviated by putting *minority* instead of 18 years (ordinarily, here minority extends up to the 18th year). So here in India the additional period is confined to the minority of the person concerned, and is not to be taken *in gross*. See Mookherji's *Law of Perpetuities*, pp. 39-49.

We have seen that the interest created *must* vest within the prescribed limits. It is not quite sufficient that it *may* vest within the limits. If at the time of its creation the limitation is so framed, as not, *ex necessitate*, to take effect, the whole devise is bad, and it cannot be validated by the subsequent happening or taking effect of the same. Or, in other words, in determining whether a gift is good or bad according to the law of Perpetuity regard is to be had to possible and not to actual events. For example, a devise is made to A (a bachelor) for life and then to his wife for life and the remainder to other persons ; the gift is invalid ; because it is *possible* that A should marry a wife who was not born at the testator's death ; that is, it is *possible* that an unborn person will take a mere life-interest and not *all that remains.* This mere *possibility* will vitiate the whole devise though in *actuality* in particular cases A's wife may not be an unborn person at the testator's death.* So, where a transfer is made to take effect in favour of an unborn person at a particular age in excess of the age of minority, the gift may *possibly* fail and therefore the law will not countenance such a transfer (See Q. 5 at p. 53.)

Does the principle that regard is to be had to possible and not to actual facts apply to the Rule against Perpetuity? B. L. (Int.) 1914 (Jan.) 1923 (July.) 1926 (Jan.)

The rule against Perpetuity—which is also otherwise described as the Rule against Remoteness—presents insuperable difficulty to a beginner. It is sure to bewilder him unless special attention be bestowed on it. This rule again appears in

* Cf. *Nabin Chindra v. Rajani*, 25 C. W. N. 901.

Sec. 114 of the Indian Succession Act where some four illustrations have been given. The student is advised to read the present section in the light of those illustrations. In plain language, the whole law may be summed up thus :—"*Except in the case of minority*, there must be **no interval** between the determination of the preceding interest and the vesting of the interest taken by the person who was not in existence at the date of the transfer." See Q. 4 at p. 54. Where an interest is so created as not to vest within the maximum period prescribed in this section, but at an uncertain or indefinite distance of time, the transaction will be ignored as being too *remote*, [58 Cal. 768]. Any condition which prevents absolute vesting for a great length of time or which provides for defeasance of interest after an indefinite time is always condemned by the Rule against Remoteness. [Cf. 35 C. W. N. 903, P. C.] It should be remembered that the rule against Perpetuity "is not a mere rule of construction but is an absolute inflexible rule of law :" (Mookherji's *Perpetuities*).

The Rule against Perpetuity in a simpler form.

The main object of the Rule of Perpetuity is to remove the restriction on the power of alienation and absolute or free enjoyment. In fact, a perpetuity is a limitation tending to take the subject out of commerce for a longer period than a life or lives in being and eighteen years, or eighteen years *plus* the period of gestation (see Lewis on Perpetuity) ; it is a thing odious in law and destructive of the commonwealth ; it prevents the circulation of the riches of the kingdom ; and is not therefore

The rule against perpetuity is an equitable law. Equity abhors perpetuity.

countenanced in equity. Remember, however, that the above rule is a branch, not of the law of contract, but of property ; therefore, *personal* contracts are not affected by the rule against perpetuities (25 C. W. N. 201). A covenant for pre-emption is more than a mere personal contract as it gives the covenantee *substantial* interest (though not exactly what is called an equitable interest in English Law) in the property and is therefore subject to the rule against remoteness although technically speaking, it does not fall within this section. 25 C. W. N. 901 ; 26 C. W. N. 874, but see 46 All., 333 ; 49 Mad. 387 ; 50 Bom. 566 ; 56 Cal. 487=33 C. W. N. 150. A recent Calcutta case, however, has held that the right to ask for reconveyance of property granted does not offend against the rule against perpetuity, because it gives rise to a *personal* obligation, 44 C. L. J. 220. According to other opinion the contract is enforceable only as between the parties to the contract, and is not binding on their heirs. Thus, where A agrees with B that in the event of his (A's) wishing to sell the property, he would first offer it to B, the contract would be enforceable as between A and B, but would not bind their heirs (All. U. 1923). In the leading case of *London & South Western Ry. Co.* v. *Gomm*, 20 Ch. D. 562, C conveyed land to P in fee with a covenant that P and his heirs and assigns would at any time on receipt of a certain sum reconvey the land to C. In a suit for enforcement of this covenant against *Gomm* (P's assignee), the Court held that the covenant gave rise to an equitable interest in the

A contract for pre-emption binds the contracting parties, but not their heirs.
All. U. 1923.

property and was therefore within the mischief of the rule against perpetuities.

Q. The owner of a Zemindari covenanted with A that if he (the Zemindar) or any of his successors-in-interest should fail to maintain A or his descendant at any time, then the latter were to have immediate right to a certain village in the Zemindari. Is a claim by a descendant of A to the village on the ground that the Zemindar had refused to maintain him sustainable? Give reasons. [Cal. 1931, July] :—*Ans* : No ; because of the Rule against Remoteness.

Exceptions to the Rule against Perpetuities :

Mention the exceptions to the Rule against Perpetuity, if there be any. B. L. (Int.) 1916 (July.)

(*a*) The Rule has no application where land is purchased or property is held by a corporation.

(*b*) Gifts to charities do not fall within the Rule, see p. 63.

(*c*) Property settled upon individuals for memorable public services is exempted from the operation of the Rule.

(*d*) Customary Easements (See Mukhopadhyay's *Perpetuities*, p. 137.)

Law of Perpetuity—how far applicable to the Hindus 1914 (Jan.)

It may here be repeated that the rules of this Chapter now apply to the Hindus and Buddhists, and therefore, these sects will now have no power to create perpetuities. From a reference to some of the Sanskrit texts it appears that the Hindus had such power. An examination of some of the qualified interests of Hindu Law (*e.g.*, those of a widow or a daughter) also leads to the inference that the Hindus, who could create life-estates, could possibly create perpetuities. The Judicial Committee however ruled in *Tagore* v *Tagore* that the Hindus had no power to create perpetuities but the Hindu jurists were not satisfied with this pronouncement ; but to our mind the Shastric injunctions against transfers to unborn persons

The rule of *Tagore* v. *Tagore* relating to gift to an unborn person has since been modified.

rendered perpetuities under the Hindu Law practically impossible. When in 1916, the Hindu Disposition of Property Act was passed authorising transfers to unborn persons, its effect was not to enlarge the powers of the Hindus for the purpose of creating perpetuities. That Act has now been so amended as to be brought into line with the provisions of Ch. II of this Act, which is now applicable to Hindus, who are therefore in no way capable of creating perpetuities.

It is worth our while to mention here that the Hindu Disposition of Property Act did not apply to Madras. But in that Province we had two Acts*—one for the city and the other for the province—validating transfers in favour of unborn persons. Consequently, the law in Madras was not different from that in the other Provinces ; see also *Muthuswami* v. *Kalyani*, 40 Mad., 818.

Perpetuity under the Mahomedan Law.

Under the Mahomedan Law a gift in perpetuity is not valid. As delivery of possession by the donor and an acceptance of the gift by the donee are essential ingredients of a Mahomedan gift, a gift to an unborn person has been held to be invalid. Over and above, a Mahomedan is not permitted to create life-estates. Alienation in perpetuity whether by a Hindu or Mahomedan for a charitable or religious object is valid : *Vide infra*, pp 63-64. But when such gifts to charity etc. are *illusory* and the real intention of the donor is to avoid the

* (i) The Hindu Transfers and Bequests Act (Madras Act I of 1914)—sec. 3 ; (ii) the Hindu Transfers and Bequests Act (City of Madras Act), Act viii of 1921, sec. 3.

stringency of the law of perpetuity, they are not allowed. A Mohomedan may however make a family settlement of his property in perpetuity provided it is made by a *wakf* with an ultimate gift to charity ; see the author's *Anglo-Mahomedan Law*, 4th Ed., pp. 282-83.

[Q. 1. A transfers property to his married daughter B for her life, then on her death to her husband for life, and then to her sons, born and unborn : but if she dies sonless, then to her daughters, born and unborn, and then to the daughters' children. How far are these provisions valid in the cases of Hindus and Mahomedans ? (B. L. 1909)—*Ans* : Under the Hindu Law, the disposition will take effect, if she has sons, but a mere life-interest to the *unborn* daughter is invalid. Under the Mahomedan law, the whole transfer falls through as neither the life-estates in favour of B and her husband, nor the gift to unborn sons and daughters can take effect.] B. L. 1909.

[Q. 2. A gives his niece in marriage and makes a gift of land to her for life, and thereafter to her children. What will be the rights of these children assuming that the parties are either Hindus, Mahomedans, or Christians ? (B.L. 1908)—According to *Mahomedan Law* the gift fails in *toto*. In the case of the Christians and the Hindus both the niece and her children can take.] B. L. 1908.

[Q. 3. Property is transferred to A for life, then to his children for their lives and after the death of the surviving child to B. A had one child at the date of the transfer and had several other children born afterwards. To whom would the property go after A's death ? Give reasons—The unborn children do not take anything as they cannot take unless the entire remaining interest in the property be given to them. The transfer does not give them the entire estate but reserves an ulterior disposition in favour of B. The living child takes his life-estate and his position is not affected by the B. L. 1911 (Jan.)

fact that the other members of his class fail to take (see sec. 15.)]

B. L. 1918 (Jan.)

[Q. 4. A property is given to X for life and then to the eldest unborn son of Y when he will attain the age of 25. At the time of the death of X, the eldest son of Y attains the age of 20. Discuss whether the gift to the unborn son is valid.—[B. L (Int.) 1918, Jan.; All 1927, Ext.]: *Ans:* No; it being a case of *majority*, the interval of 5 years between the determination of the preceding life-interest and the vesting of the interest in the unborn son is not permissible under Sec. 14. N. B.—Such an interval is permissible only in the case of *minority*. See p. 49, *ante*]

[Q. 5. A gift is made of a fund to A for life, and then to B for life, and after B's death to such of the sons of B as shall first attain the age of 25. B dies in the life-time of the donor leaving two sons. Examine the validity of the gift,—(All 1926, Ext.) (see p. 48).]

Contrast between sections 13 and 14: Both these sections alike check the creation of perpetuities though sec. 14 alone is called the perpetuity section. Under sec. 13 the transferor is not permitted to transfer any but an absolute (whole) estate in favour of an unborn person, when the transfer in his favour takes effect after the determination of the intermediate interest, created by the same transfer. So, life-estates cannot be perpetrated for an unlimited length of time. Under sec. 14, the *transfer* itself, whether of a whole or limited interest cannot be created so as to last for one or more *existing* lives *plus* 18 years (and the period of gestation in case of a possible issue): see Dr. Gour's *Transfer of Property*. So both the sections equally prevent the perpetual locking up of the property.

Transfer to a class some of whom are excluded by secs. 13 and 14 from taking, fails altogether.

Sec. 15. Transfer to a Class: If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in secs. 13 and 14, such

interest fails *in regard to those persons only and not in regard to the whole class.*

The section as it stands now says that if on a transfer of property, an interest is created for the benefit of a class of persons, and if some persons of this class fail to take by reason of the provisions of secs. 13 and 14, the gift fails only with respect to such persons and not in regard to the whole class. Formerly the section was modelled on the rule in *Leake* v. *Robinson*, 2 Mer. 363, which laid down that a bequest made to a class of persons with regard to some of whom it failed was void as to the whole, and the reason for this rule was that a contrary view would split up the transfer and make it valid with respect to some persons of the class and invalid as to the rest and that would be making a disposition which the transferor never intended. The effect of this section on transfers to classes made by Hindus came to be considered in a number of cases. But at the very out-set it should be remembered that chapter ii (containing sec. 15) did not formerly apply to the Hindus in respect of matters which were differently provided for under their personal law, (*vide* p. 8) and that Hindu Law did not permit transfers to persons not in existence on the date of the transfer (Cf. *Tagore* v. *Tagore*, 9 Beng. L. R. 377, 397). Now, the first case to consider the effect of this section on Hindu transfers was *Rai Bishen Chand* v. *Msmt. Aamaida Koer*, 11 I. A., 164=6 All., 560, P.C. In this case a Hindu made a gift of his property to his grandsons one of whom was then in exis-

and others were then unborn, and it was contended that the rule in *Leake* v. *Robinson* applied to the case, and as the gift to the *unborn* grandsons was invalid under the Hind law, the whole gift to the class (including even the grandsons in existence) failed, but the Judicial Committee overruled the contention holding that the gift to the *unborn* grandsons failed not by reason of secs. 13 and 14, but by reason of their *personal incapacity* (under the Hindu law) to take, and therefore the rule enacted in the section on the authority of *Leake* v. *Robinson* had no application. A similar view was taken also in *Radha Prosad* v. *Ranimoni Dasi*, 38 Cal., 188 (affirmed by P.C. in 41 I. A. 176). The rule in *Leake* v. *Robinson* (as Wilson J. pointed out in *Ram Lal* v. *Kanai Lal*, 12 Cal. 663) was an extremely artificial rule of construction as to the probable intention of the transferor based on the peculiar habits of thought and modes of expression of the English people and was unsuited to the people of this country. Even in England the rule has been followed in subsequent cases not without expressions of reluctance [see *In re Moseley's Trust* (1879) 11 Ch. D. 555; *Pearks* v. *Moseley*, (1880) 5 App. Cas. 714]. The soundness of the rule again came up for consideration in *Bhagabati* v. *Kalicharan* 32 Cal. 992, F.B. (affirmed by the P. C. in 38 I. A. 54=38 Cal. 468=15 C.W.N. 393). In this case, a bequest was made to certain nephews, three of whom were living at the time of the testator's death ; others were unborn. The principle of *Leake* v. *Robinson*

Leake v. Robinson dissented from in *Bhagabti v. Kalicharan.*

was sought to be applied; but Maclean C. J., disallowed its application holding the gift in favour of the living nephews to be valid. In 1916, the Hindu Disposition of Property Act was passed to validate transfers to unborn persons. Though this Act did not apply to the Province of Madras, still the law in that Province was not very much different because the Madras Acts I of 1914 (applying to the mafusil), and viii of 1921 (applying to the Presidency-town) to a great extent, brought the law in that Province to the level of the Hindu Disposition of Property Act. All these three Acts left this section (dealing with gift to a class) severely alone and one important consequence resulted from this fact as is illustrated by the case of *Soundara Rajan* v. *Natarajan*, 52 I. A. 310. Prior to the passing of these Acts if a bequest was made by a Hindu (subject to the Hindu Wills Act) in favour of his daughter "for her life and after her death to such of her children who shall attain the age of 21 years," and some of the children were born before and others after the death of the testator, the gift failed only in respect of the unborn children and not in its entirety (*Vide Bhagabati* v. *Kalicharan*, *supra*), because the failure in respect of unborn children was by reason of their *personal* incapacity. After the passing of those three Acts a transfer to unborn persons became valid, that is, the *personal incapacity* was removed, and the gift in the hypothetical case contemplated above failed by reason of the rule against perpetuities because of the condition

about 21 years. So sec. 15 applied with the consequence that the gift failed in its entirety, *i..e*; even in respect of the living children (See *Soundara Rajan's* case). In order to avoid this unhappy consequence the Legislature has thought it fit to give a go by to the rule in *Leake* v. *Robinson* and lay down that the gift will not fail in regard to the whole class, but only in regard to those persons who are within the mischief of secs. 13 & 14. As Ch. ii, has been extended to the Hindus, necessary amendments have been made in those three Acts to bring them in perfect harmony with the law laid down in this second chapter of the T. P. Act.

_Q._ 1. A transfers his property to his grandson X and other grandsons, brothers of X who may be born thereafter on their attaining the age of 25. Discuss the validity of the gift. (B. L. Int. 1922, July).

Ans*: Void as to the interest of the unborn person, because the 25th year may fall beyond the 18 years' rule, but not as to the interest of X, see Ex. (b) of sec. 115, Indian Succession Act,, *Vide above.

Transfer to take effect on failure of the prior interest.

Sec. 16. Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

This section has been recast by the amendment of 1929, but no substantial change has been introduced in it except that the reference to sec. 15 has been omitted. As the present sec. 15 no longer

provides for the case of a complete failure of a transfer, any more reference to it is unnecessary. The reference to secs. 13 & 14 has been retained as a prior interest may altogether fail by reason of the rules contained in those sections. The section provides that where a prior interest created in favour of a person or a class of persons fails in regard to such person or the whole of such class by reason of contravention of the provisions of secs. 13 and 14, any subsequent interest which is intended to take effect after or upon failure of the prior interest also will fail. The principle of law involved in this rule is drawn upon the principle of English Law of Real Property which forbids the creation of a "possibility upon a possibility". Thus, A gift is made to A for life and then to A's son (not in existence) for life and then to the son of A's son ; here the gift to A's son would fail by reason of sec. 13 which prohibits the grant of a mere life interest to an unborn person ; therefore, the subsequent gift to the son of A's son will also fail. Again, the prior interest may fail by not vesting within the perpetuity period (sec. 14) and in that case too the subsequent interest will fail. Thus, A makes a gift of property to B, a bachelor, for life ; then to such of B's sons as shall attain the age of 25 and on failure of such sons to C who is in existence at the date of the gift (All. 1927, *Ext.*) ; here the gift to B's son offends against the rule of perpetuities ; therefore the gift over to C will also fail, although he is a person in existence at the time of the gift.

The reason of the rule in this section is self-evident. Secs. 13 and 14 discourage perpetual locking up of property and insist on early vesting of absolute right. A transfer fails under sec. 13 or 14, because it defeats early vesting, and if upon the failure of such a transfer, an ulterior disposition could take effect, the object of early vesting will be frustrated, and the said secs. 13 and 14 will become meaningless.

The failure of the prior interest must be due to secs. 13 and 14, otherwise this section will have no operation. Thus, in *Adjudhia* v. *Mt. Rukmin*, (10 Cal., 182) the prior interest failed for want of registration under the Oudh Est. Act 1 of 1869, and the Court held that the subsequent interest would not fail but would take effect at once. It is on this principle that where a gift was made to the testator's daughter for her life and after her death to her children upon the failure of the gift in favour of the daughter by reason of her having attested the will, the ulterior disposition to her children took effect forthwith.

Direction for accumulation B. L. 1905.

Sec. 17. (1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

(*a*) the life of the transferor, or

(*b*) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during

which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(*i*) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(*ii*) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(*iii*) the preservation or maintenance of the property transferred ;

and such direction may be made accordingly.

N. B.—This was formerly section 18, which though owing its origin to the Thelluson Act, 32 & 40 Geo. III. C. 98, allowed accumulation for one year only from the date of the transfer.

Direction for Accumulation : The arguments against *accumulation* are primarily three in number : (i) It keeps ownership in abeyance, (ii) It puts restrictions on free enjoyment of property ; (iii) It might infringe the rule against perpetuities. On these considerations, formerly a direction for accumulation was allowed for a period of one year only from the date of the transfer. In England the Thelluson Act allowed accumulation for a

much longer period and in certain cases the restrictions against accumulation was not applicable at all. Thus, that Act allowed accumulations for the payment of debts and for providing funds for children. Accumulations are also allowed in English Law for maintaining property in good repair [*(1891) 2 Ch. 13]. By subsequent Acts more exceptions were added to the rule enacted in the Thelluson Act; see secs. 164-66 of the Property Act, 1925 (15 Geo. V,c. 20). These liberal ideas in favour of accumulation gradually came to influence the judicial opinion in India and it came to be held here that if there was nothing *per se* illegal in a direction to accumulate, and if such direction was neither so unreasonable in its conditions as to be against public policy, nor given for the purpose of carrying out an illegal object, the direction should be given effect to; see 34 Cal. 5. Likewise it was again said that a direction to accumulate with a gift of the accumulations is not fundamentally bad; it only fails if it offends against some independent rule of Hindu Law; see 47 Cal. 88, 93-Footnote. In certain cases, as a matter of of fact, a Hindu has been held competent to direct accumulation under certain circumstances; see *Amritolal* v. *Surna Moyee*, 24 Cal., 589. The Legislature has now come to accept the more liberal view in the matter and permitted accumulation—(i) during the life-time of the transferor, or (ii) for a period of 18 years from the date of the transfer, whichever of these two periods is longer. Where a direction for accumulation exceeds the longer of

the above two periods it will not be altogether void, but will fail only in respect of the excess period. Sub-sec. (2) of the new sec. 17 now altogether abolishes the restriction against accumulation in relation to (i) provisions for the payment of the debts of the transferor or the transferee, or (ii) provisions raising portions for children of the transferor or the transferee, or (iii) provisions for the preservation or maintenance of the property transferred. It should be noticed that the spirit of the present section is rather to favour accumulation and to allow it for a considerable length of time (not less than 18 years in any case), whereas the spirit of the old section was to discourage it only making a small concession in its favour which was to last only for a period of *one* year from the date of the transferor.

In India a direction for accumulation has been held valid in the case of Hindu and Muhammedan religious endowments though it infringed the rule against perpetuities ; see 34 Cal. 5 ; 23 C. L. J. 241 ; 34 Mad. 12. Now, under the present section 18, accumulation has been rendered permissible in cases of endowments.

Transfers in perpetuity for benefit of public.

Sec. 18 : The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

This is old section 17, only with this difference that reference to certain sections has been modified in conform-

ity with the amendments effected in the previous sections. Now, the restrictions contained in secs. 14 and 16 and also the restrictions as to accumulations (contained in sec. 17) should not apply to charities.

By reason of this section a transfer made for public benefit, *i.e.*, for the advancement of religion (*e.g.*, by establishment of churches etc.), of knowledge (*e.g.*, by founding schools and colleges), of commerce, health, safety or any other object beneficial to mankind (such as building poor houses orphanages etc.) is not subject to the restrictions in secs. 14, 16 and 17. Therefore, a valid dedication for any of the aforesaid purposes will not fail by reason of contravention of the rule against perpetuity. Consequently, a *permanent* transfer for charitable object is quite feasible. Where an eminent and distinguished Indian lawyer and jurist with the object of promoting scientific education in the country made a gift to trustees of Government Promissory Notes of the value of ten lakhs of rupees *in perpetuity* for maintaining a public college of science (B. L. Int., 1915 July), the gift was held to be valid. But where the gift in favour of a charity does not vest immediately, but is made subject to the condition that the donor's debts should be liquidated out of the income of the property, it is affected by the rule against remoteness, *Santona Ray* v. *Advocate General*, 48 Cal. 124 = 32 C. L. J. 453. A gift for the spiritual benefit of the donor himself or for the repair of a private tomb and like other gifts will not however be protected, not being for public benefit or for advancement of religion.

Does the rule against perpetuity apply to transfers for public benefit? 1920 (July).

Perpetuities for superstitious uses though discountenanced in England may be permitted in this country.* A mere bequest to *dharam* is void being too vague and uncertain for administration.†

Examine the validity of the following gift :—Gift of G. P. Notes in perpetuity for maintaining an orphanage [All. 1922]—*Valid.*

Sec. 19. Vested interest : When on a transfer of property an interest is created in favour of a person without specifying the time when it is to take effect or in terms specifying that it is to take effect forthwith, or on the happening of an event which *must* happen, such interest is vested.

Vested interest defined.

A vested interest is not defeated by the death of the transferee before he obtains possession. A vested interest, as opposed to contingent interest, is transferable as well as heritable ; so that if the transferee dies before actual enjoyment of it, the vested interest will pass on to his heirs.

A vested interest is indefeasible.

Explanation : When in a transfer there is a provision postponing the *enjoyment* of the property or creating a prior interest in it or when there is a direction for accumulation or when there is a provision in it that if a particular event happens the interest will pass to another person, it is not to be inferred that the property was not intended to vest. The principle of law is that estates transferred should vest as early as possible. The natural presumption is always in favour of imme-

* *Fatmabibi* v. *Advocate General*, 6 Bom. 42 (50)
† *Runchordas* v. *Parvati*, 26 I A. 71=23 Bom. 725, P.C.

diate vesting unless there be a clear direction to the contrary.

What is meant by saying—a property having *vested in possession* and *vested in interest* only, *i.e.* an estate vested not in *possession*? B. L. 1912 (July) All. 1921.

Where a transfer is made in general terms without specifying the time when it is to take effect, the transferee takes an *immediate* vested interest which is said to be *vested in possession*, *i e.* to say, there is a present right to the immediate possession or enjoyment of it. Where there is a present indefeasible right to the future possession or enjoyment of an interest in property, that is said to be *vested in interest* only and *not in possession.* Notwithstanding the postponement of the right of enjoyment or possession, the transferee gets a *proprietory* interest in the property,

Contingent interest as defined in T. P. Act. All. 1925 (*Ext.*)

A contingent interest is an interest which is not ready to come into effect at once ; some condition remains unfulfilled, and as long as that is so the interest cannot be vested. The T. P. Act defines **contingent interest** as follows :—**Sec. 21**—" Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a *specified uncertain event*, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property." A contingent interest becomes vested when the condition that gives it the contingent character is fulfilled ; or in other words, when the contingency happens, or its happening becomes impossible, as the case may be. Thus, a gift is made to A for his life, and after his death to such son of A as shall first attain the age of majority ; the

When does a contingent interest become vested? 1915 (Jan.)

interest accruing to any such son is a contingent interest as the fact of A's son's attaining majority is uncertain, but it will become a *vested interest* as soon as he has attained the age mentioned.

But when by a transfer a principal sum is given to A on his *attaining* a particular age and the whole income of the principal sum is given to him *in the meantime*, A will have a vested interest and not a contingent one though there is a condition superadded. See *exception* to sec. 21.

Q. 1. Property is transferred to A for life, then to B for life, and then to C. Both B and C die during the life-time of A leaving heirs. To whom would the property go after the death of A? Give reasons. Here B's interest being a life-estate his heirs do not take anything. But C having a vested interest, his heirs take after A's death, B. L. 1911 (Jan.)

Q. 2. A property is transferred to A for life, and after his death to B and C in equal shares *if they shall survive* A. B dies in the life time of A. To whom does the property go? *Ans*: Though A's death is a *certain* event, the fact of B and C surviving him is *uncertain*; therefore B's interest is only contingent and on his death his moiety does not go to his heirs but reverts to the transferor's heirs. C takes his moiety and not the whole property by survivorship.

Q. 3 A makes a gift to B for life and then to C. C dies leaving issue during the life-time of B. What becomes of the gift to C. (B. L Int. 1922, July; 1929, Jan.).—*Ans*: C takes a vested interest (*vide post*); therefore, his interest passes on to his issue.

Points of difference between a vested interest and a contingent interest. 1917 (Aug.)

The chief points of difference between the two kinds of interest may be noticed as follows:—

1. A *vested interest* does not depend upon the fulfilment of any condition: it creates an immediate right though the enjoyment may be postponed

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to a future date. But a *contingent interest* is solely dependent upon the fulfilment of the incumbent condition, so that in case of non-fulfilment of the condition the interest may fall through.

How does this distinction operate upon the devolution of the property transferred? B. L. (Int.) 1923 (July). 1925 (Jan.)

2. A *vested interest* is not defeated by the death of the transferee before he obtains possession. But *contingent interest* cannot take effect in the event of the transferee's death before the fulfilment of the condition. It may however ripen into a vested interest on the fulfilment of the contingency.

3. A *vested interest* is transferable as well as heritable, but a *contingent interest* is not so. If the transferee of the vested interest dies before actual enjoyment it will pass on to his heirs, *Ellokasi* v. *Durponarain*, 5 Cal., 59. See also 9 M. I. A. 323. But that is not the case with contingent interest : this latter is a mere chance which is inalienable and intransmissible.

Which of the two is transferable and why? (Read clauses 3 and 4). B. L. (Int.) 1917 (Aug.)

4. In a *vested interest* there is a present, immediate right even when its enjoyment is postponed. In a *contingent interest* there is no present right ; there is a mere promise for giving one and such promise may be nullified by the failure of the condition.

N. B. The question whether particular words convey vested or contingent interest is often a question of construction (8 Cal., 878) ; and in construing a deed in order to ascertain the nature of the interest it creates we must look to the plain and ordinary meaning of the words used. It should be borne in mind that the mere postponement of the beneficial enjoyment is no *criterion* for judging the vested or contingent nature of the interest conveyed. There is a distinction

between the cases where the event in which the transfer is to take effect is uncertain and those in which it is certain, though future.

Sec. 20. When an enterest is created for the benefit of an unborn person, such person, acquires a vested interest on birth *unless a contrary intention appears from the terms of the transfer*, although he may not be entitled to the enjoyment thereof immediately on his birth.

An unborn person's interest becomes vested on birth.

Illustration :—A gift is made to A for life and then to his son (then unborn). During the continuance of A's life-estate, the unborn son comes into existence. Here this son takes a vested interest as soon as he is born though he is not entitled to immediate enjoyment thereof. So that even if this son predeceases A (*i e.* the father), such son's son (*i. e.*, A's grandson) will inherit the property and prevent it from reverting to the original donor.

The general rule of this section, namely, an unborn person takes a vested interest on birth may be avoided by a clear manifestation of a contrary intention in the deed of transfer itself. Notice the words in italics, *viz* "unless a contrary intention etc." Thus, where the deed of transfer provides that the unborn son shall take only on attaining a particular age, there is a contrary intention negativing the acquisition of a vested interest on birth. A condition superadded in this manner virtually gives him only a contingent interest, and he can take a vested interest only on the fulfilment of the contingency and not on birth. If the prior interest ceases before he attains majority, the contingency must be fulfilled before the determination of the prior interest or at any rate during his

minority (provided there is a trustee to hold the property after the prior interest) otherwise the transfer will fail altogether. The reason is obvious; if the contingency does not happen during the subsistence of the prior interest or during minority, (there being a trustee in the meantime as aforesaid), the property, will remain without an owner, or the vesting of the property will be delayed *beyond minority* which is contrary to the law of Perpetuity; see p. 49.

Sec. 22. Where on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

For example, when a gift is made to such children of A as shall attain a particular age, no children of A below that age shall have a vested interest in the property. So that children below that age will have but a contingent interest which will develop into a vested interest only when they attain that age; *i.e.*, to say, if they die below that age, their heirs will not take anything. But the children above that age will on their death transmit their interests to their respective heirs.

The limits within which the contingency is to take place.

Sec. 23. When a contingent interest is created in favour of a *specified person* and *no time is mentioned for the happening of the contingency*, the contingency must happen before the determination of the prior interest; or, in other words, the occurrence of the event on which the vesting depends must take place before the prior interest

ceases, otherwise there will be an *interval* between the cessation of the prior interest and the vesting of the subsequent interest during which the property will remain in abeyance which is contrary to law.

For example, a gift is made to A for life and afterwards to B if B returns from England. Here B's returning from England is a contingency and no time is mentioned for its happening, so this contingency must happen before the determination of A's interest, if B were to take anything; otherwise after termination of A's interest the property will remain in abeyance. But this rule does not touch the case *where a fixed time is mentioned for the occurrence of the event.* When a time is specified for the occurrence of the contingency, (*e.g.*, where it is provided that if B returns from England within 10 years) and such time extends beyond the cessation of the prior interest, there must be some trustee to hold the property during the period intervening between such cessation and the happening of the contingency, otherwise the property will lapse into abeyance or the interest will fail.

This section is practically based upon the rule of the English Law that every contingent remainder must vest during the continuance of the preceding freehold estate which supports it, or *co instanti* (simultaneously) with the determination of that estate, see *Cunliffe* v. *Brancker*, 3 Ch. D. 393; also *Pearks* v. *Moseley*, 5 A. C. 714, at p. 721. But there is some difference **B. L. (Int.) 1924 (July.)**

between this old Feudal Rule and the above rule of sec. 23. We have already seen that sec. 23 does not apply when a fixed time is mentioned for the occurrence of the event.

Q. A gift is made to A for life, and a gift over to B, if C marries D. C marries D after A's death. Discuss if the gift over to B is valid. B. L. (Int.), 1921 (Jan.) *Ans*: As the contingency does not happen before the determination of A's interest, B takes nothing. *Vide* p. 71,

Transfer to such of certain persons as survive at some period not specified.

Sec. 24. Where, on a transfer of property, an interest is to accrue to such of *certain* persons as shall be surviving at some period but the *exact period is not specified*, the interest shall go to such of them as shall be alive at the time of the cessation of the prior interest unless the contrary is intended.

Illustration:—A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the lifetime of B. D survives B. At B's death the property passes to D.

As it is uncertain who will survive at the period in question, the gift is a contingent one, and none of the transferees take a vested interest. Therefore, their heirs take nothing; the survivor fulfils the condition and therefore takes the gift.

In *Nandi Singh* v. *Sita Ram* (6 Cal., 677) it was held that when a transfer is made to some *unascertained*, yet *certain* persons, who will be ascertained after the lapse of a given period, no interest vests in anybody until the arrival of that given period, as till then the exact transferees are not ascertained.

Conditional transfers: When an interest is created on a transfer of property and is made to

depend on a condition, the transfer is said to be a *conditional transfer.* When the interest is made to accrue on the fulfilment of the contingency, the condition is said to be a **condition precedent**; but if it is provided that the interest already created is to cease to exist or is to pass on to another on the happening of the condition superadded, it is called a **condition subsequent**. So there are two kinds of conditional transfers : (1) In one the condition on which the transfer depends is a *condition precedent* : (2) In the other, it is a *condition subsequent.* Thus, a gift is made to A on condition she marries B, this is a condition *precedent* as the condition has to be fulfilled before the transfer can take effect. Again, a property is transferred to A, but if A digs any excavation so as to diminish the value of the property or to affect the buildings adjoining the property he will forfeit his interest. This is a condition *subsequent* as the transfer takes effect before A can be divested of his interest because of the breach of the condition. *The main distinction between the two is shortly this :* In one case the condition comes before the creation of the interest, and in the other, the interest is created before the condition can operate to determine it. That is, one *precedes* the vesting and the other follows the vesting. In the case of *condition precedent*, the vesting of the estate is postponed till the performance of the condition ; but in the case of *condition subsequent*, the vesting is complete and not postponed, though the interest vested is liable to be divested by

Distinguish between conditions *precedent* and *subsequent* : give one illustration of each. B. L. (Int.) 1915 (July). All. 1922

Point out if there is any difference in the rule of construction of conditions *precedent* and *subsequent*. B. L. (Int.) 1929 (Jan.)

reason of the non-fulfilment of the condition. Where the condition is *precedent*, the estate is not in the grantee until the condition is performed, but where the condition is *subsequent*, the estate vests immediately in the grantee and remains in him till the condition is broken (*Wynne* v. *Wynne*, 2 M. & G. 8 at p. 14). So the result is that in one case once the estate is vested, it is *never divested*; while in the other it is always liable to be divested. "The first (condition precedent) affects the acquisition of an estate, whereas the second (condition subsequent) merely affects its retention." Besides, where the condition precedent is impossible, the transfer is void, but where it is a condition subsequent, it is valid, the condition being ignored.

The nature of a condition precedent.

In case of a conditional transfer the *condition precedent* must be *valid in law*, *i.e.*, to say, the condition should not be an impossible thing, it should not be illegal, fraudulent, immoral or injurious to others, nor opposed to public policy. (See sec. 25). Thus, a transfer is made to X on condition that he shall walk a hundred miles in an hour or shall marry a prostitute or shall murder a man or shall desert his wife; in all these cases the transfer is void. Any condition in general restraint of marriage is invalid, but conditions in partial restraint of marriage are generally valid. Thus, con-

X transfers a farm to Y on condition that Y shall murder her husband: Q. Is the transfer valid?—No. 1918 (Jan.) 1921 (July).

Conditional transfer.

Sec. 25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provision of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

ditions restraining the transferee's marriage with a Mahomedan or an outcast, or restraining marriage during minority or without the guardian's consent, are all valid. A condition prohibiting a change of religion or the transferee's going to England is also valid.

Sec. 26. When there is a condition *precedent* to the accrual of an interest, the condition shall be deemed to have been fulfilled if it has been *substantially complied with.* Thus, a transfer is made to X on condition that he shall marry with the consent of M, N and P; but P dies soon after. X is deemed to have fulfilled the condition when he marries with the consent of M and N. In case of a condition precedent subsequent fulfilment of the condition will not do. Thus, in the above example if B takes the consent of M, N and P (supposing P does not die) *after* his marriage and not *before*—the condition is not fulfilled and he cannot take any interest.

Substantial compliance amounts to fulfilment of condition *precedent*; but subsequent compliance does not.

This section practically lays down what is, commonly known as the doctrine of **Cy pres**, *i.e*, when the literal performance of the antecedent conditions is rendered impossible for certain reasons or other, substantial perfomance in *conformity with original intentions* of the transferor may do. "Where a literal execution of the intention of the transferor becomes inexpedient or impracticable the Court will execute it as nearly as it can according to the original purpose or *Cy pres.*" Story's *Equity Jurisprudence*, Vol. II., 12th Ed., p. 403. Thus, where the consent of several persons is

The Doctrine of '*Cy pres*'. Mad. 1913. Explain with illustrations the application of the doctrine of *Cy pres* to some of the provisions of the T. P. Act. B. L. (Int.) 1930 (Nov.)

necessary for the marriage of the transferee and some of the persons become insane or die, the consent of the rest will do. Where time is not the essence of the condition, fulfilment of the condition in a reasonable time is sufficient compliance. Where the consent of a guardian is imposed as a necessary condition, the consent of the transferor himself is sufficient. Silence on the part of the man whose consent is necessary is equivalent to his consent. ('Silence, indicates consent'—as the Sanskrit proverb says).

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

Sec. 27. When by a transaction a conditional transfer is made in favour of one person with an ulterior disposition of the same interest in favour of another in case the prior disposition fails, the ulterior disposition shall take effect upon the failure of the prior disposition, *although the failure may not have occurred in the manner contemplated by the transferor.*

Illustration--A transfers Rs. 500 to B on condition that he shall execute a certain lease within 3 months after A's death, and if he should neglect to do so, to C. B dies in A's life-time. Can C take the money ? Give reasons in support of your view.—B. L. (Int.) ; 1917 (Jan.)—*Ans* : The disposition in favour of C takes effect, although the *failure* occurs by B's death—not contemplated before.

Problem : A testamentary gift was made to the daughter for life and after her death to her children. The gift in favour of the daughter failed by reason of her attesting the testator's will, the gift in favour of the grandchildren got accelerated thereby and took effect immediately, although the gift did not fail by the death of the daughter as contemplated in the will. The manner of failure is immaterial.

Okhoymoni v. Nilmoney, 15 Cal., 282 : There was a gift to the *possible* son of the testator (then *en ventre sa mere*) and in the event of such son dying before attainment of age there was a gift over to the testator's brother. The *possible child* turned out to be a daughter ; *held*, the gift to brother took effect though the failure of the first gift did not take place in the precise mode contemplated by the testator.

Radha Prasad v. Ranee Moni, 33 Cal., 947 : A transferor gave his widow an authority to adopt a son and directed that such son was to take his property and in the event of his death during the life-time of the widow the property was to go over to the transferor's daughters. The authority to adopt was found to be invalid and this was held to accelerate the ulterior disposition in favour of the daughters who were therefore held to take at once.

Doctrine of Acceleration.

This section lays down what may be called the **Doctrine of Acceleration.** That is, when a prior disposition is made to depend on a condition and it is provided that on the failure of the prior disposition for non-fulfilment of the condition, the property is to go over to another person, the ulterior disposition, instead of failing on the failure of the prior disposition, is rather *accelerated* and takes effect forthwith. Thus, in *Ayudhia Buksh* v. *Msmt. Rukmin,* 10 Cal. 482 (P. C), the Privy Council has held that a prior disposition proving void, the ulterior disposition is accelerated and not destroyed by reason of the *Doctrine of Acceleration.* For the purpose of this section it does not matter whether the prior disposition fails in the manner contemplated by the transferor. But where the intention of the parties to the transaction is that the ulterior disposition shall

take effect only in the event of the prior disposition *failing in a particular manner*, the ulterior disposition shall not take effect unless the prior disposition fails in that manner. Thus, in *Underwood* v. *Wing*, (4 De G. M. and G. 633) where a property was given to a wife with a condition that in case of her death before the husband the property was to go over to X; the husband and wife both died in the same shipwreck leaving it unascertained who died before. Here, the disposition in favour of X did not take effect. It should be remembered that the principle of *acceleration* does not apply when the prior disposition fails by reason of secs. 13 and 14. In that case the ulterior disposition also fails (*vide* p. 60, *ante*).

Underwood v. *Wing*, 4 De G. M. & G. 633.

Secs. 28-30. When there is a *condition subsequent* in a transfer, the non-fulfilment of the condition will either operate to revest the property in the transferor or pass on the property to an ulterior transferee; in the latter case it is called a *conditional limitation*. Thus, a sum is transferred to A to be paid to him on his marrying with C's consent and on his non-compliance therewith the sum is to go over to B. This is a conditional limitation; on A's failing to marry with C's consent the disposition to B, the ulterior transferee, takes effect. Thus, again, A transfers a farm to B, provided that if B will not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases. In this case there is no gift over; so on the failure

of B's interest, the property reverts to A, the transferor. [B. L. Int., 1924, Jan.]

The Doctrine of *Cy pres* is inapplicable to condition *subsequent*.

In Sec. 26 we have seen that a condition *precedent* is deemed to have been fulfilled if it has been *substantially* complied with, but in case of condition *subsequent* this leniency is not shown ; unless the condition *subsequent* be strictly fulfilled, the disposition will not take effect. It must have been noticed that the doctrine of *Cy pres* implies a certain amount of leniency in law. So the said doctrine cannot apply to transfers with *conditions subsequent.*

It is curious to note that a condition which is a condition *subsequent* with respect to a prior disposition is a condition *precedent* with respect to the ulterior disposition. So all the foregoing sections will apply to it with the exception of section 26 [which provides for *substantial compliance* instead of *strict compliance* of Section 29).

Incidents of condition *precedent* compared with those of condition *subsequent*. All. 1926 [Int.]

The condition *subsequent* should be valid in law. If the event to which it relates be one which could legally constitute the condition for the creation of an interest it is enough. In the case of a condition *precedent* validity is to be strictly construed : (See Sec. 25) ; but, in the case of a condition *subsequent* same strictness is not necessarily observed, though sec. 32 (*vide post*) says that the condition in all events must be a valid one ; it is enough if the intention of the transferor has been carried out. Thus, a transfer is made to a girl with a condition superadded that in case of the girl's marriage the transfer will not take effect :

here the condition will not be invalid as a restraint on marriage since the transferor's intention is obviously to provide for the girl if she remains unmarried. (Read sections 31 and 32 below.)

Prior disposition not affected by invalidity of ulterior disposition.

If a condition *precedent* be invalid the whole transfer is invalid and falls through. But if the condition *subsequent* is invalid the transfer is deemed unconditional or in the language of the Legislature, (**Sec. 30**) "If the ulterior disposition is not valid the prior disposition is not affected by it." Thus, A transfers a farm to B for her life, and if she does not desert her husband, to C. (C. U. 1921, July ; All. U. 1926, *Ext.*). B is entitled to the farm during her life as if no condition had been inserted.* Similarly, where a gift is made to A with a condition that if A does not murder a certain person in a year, it will go over to another person, A's interest is not affected by the condition.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

Sec. 31. *Subject to the provisions of section 12,* on a transfer of property, an interest therein may be created with the condition superadded, that it shall cease to exist in case, a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(*a*) A transfers a farm to B for his life with a proviso that, in case B cuts down a certain wood the transfer shall

* See *Narsingh Rao* v. *Mahalakshmi*, 55 I. A. 180=50 All. 375=48 C. L. J. 106=32 C. W. N. 1065 (P. C.)

cease to have any effect. B cuts down the wood. He loses his life interest in the farm.

(*b*) A transfers a farm to B, provided that if B shall not go to England within three years after the date of the transfer his interest in the farm shall cease. B does not go to England within the term specified. His interest in the farm ceases. (C. U. 1924, Jan.).

What do you understand by an absolute estate subject to a defeasance clause? What are the restrictions in the power to create such an estate. All. U. 1923.

This section deals with the effect of a defeasance clause in a transfer. The opening reservation in the section, viz. "Subject to &c". shows that sec. 12 furnishes an exception to this rule. That is, no defeasance clause can be inserted to make an interest determinable on bankruptcy or on attempt to alienate. The difference between this section and sec. 28 is that under the latter section the interest passes to another man; but under the present section, it *ceases i.e.*, it reverts to the transferor. A defeasance clause that is indefinite and too remote is invalid because of the rule against remoteness, *Saruja Bala* v. *Jotirmoyee*, 35 C. W. N. 603 (P. C.)

Such condition must not be invalid.

Sec. 32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

We have already seen (at p. 79) that the conditions *subsequent* must at any rate be valid. As to what conditions would be looked upon as invalid, reference may be made to section 25, *ante*. So, it necessarily follows that where A transfers a farm to B subject to the condition that if B does not desert his wife within three months, B's interest in the farm will cease, (C. U., 1924, Jan.) the invalid condition *subsequent* will not invalidate the transfer.

Transfer conditional on performance of act, no time being specified for performance.

Sec. 33. Where a transfer is made conditional on performance of an act and no time is specified for its performance the condition will be deemed to be broken when the performance of the act is rendered impossible for an *indefinite* period or *permanently*.

Thus, a transfer is made to X with a condition that the transfer will cease to have any effect if he does not marry B. X marries C and thereby *indefinitely* postpones the fulfilment of the condition ; the transfer does not take effect. Or, suppose that the condition is that the transfer will take effect only in case of X's entering the army ; but X takes holy orders and renders the fulfilment of the condition *permanently* impossible, the transfer falls through. We have similar enactments in Sec. 136 of the Ind. Suc. Act (of 1925) and in Sec. 34 of the Contract Act. But the English law on this point is somewhat different. Thus, in *Randall* v. *Payne*, 1 Bro. C. C. 55, it was held that the marriage of X with C did not preclude the possibility of his marriage with B, as X might survive C and then marry B.

Effect of fraud preventing the non-fulfilment of an imposed condition.

Sec. 34. When a transfer is made in favour of a person with a condition precedent or subsequent imposed on him, then, if the person (*i.e.* the transferee) be prevented from fulfilling the condition by the fraud of a person interested in its non-fulfilment, the inability of the transferee will be excused or the condition will be discharged against the author of the fraud. [Fraud, as is commonly known, withholds the operation of

law ; it vitiates everything ; it saves even limitation.]

N. B.—The section is based on the principle that no man can take advantage of his own fraud. Under the Hindu Law conditional transfers are valid and in order to make the transfers effective the conditions must be fulfilled unless they are repugnant to the interest created or illegal or immoral or otherwise invalid in law,

Recapitulation :—It should be observed that there is a distinction between (1) the transfer being void and (2) the condition being void. In the latter case the transfer stands good as the transferee is not required to perform, or is incapable of fulfilling, the condition. When the condition is to restrict alienation or free enjoyment the condition is void but the transfer is good (Secs. 10 and 11). When the condition is to disregard the natural incidents of property or to oppose the operations of law it is not valid, but it does not invalidate the transfer (Sec. 12). Transfer to an unborn person without giving him the entire interest is invalid *in toto* (Sec. 13) : so is the transfer that tends to create interests in perpetuity (Sec. 14). A transfer to a class, failing with respect to some, does not necessarily fail with respect to the rest (Sec. 15). A direction for accumulation is valid up to a certain limit and when it exceeds that limit it does not necessarily invalidate the transfer (s. 17). When the condition is impossible, illegal or opposed to public policy, the whole transfer fails (Sec. 25). When in a transfer there is a gift over, which is invalid for some reason or other, the prior disposition does not fail (Sec. 30). The general principle of law is—if the condition *precedent* be invalid the transfer is invalid ; if the condition *subsequent* is invalid, the transfer is deemed unconditional (*i.e*, independent of any condition), and the condition is ignored.

Distinction between *valid* transfers with void restrictions and transfers void because of void restrictions. B. L. (Int.) 1912 (Jan.)

ELECTION.

Election may, ordinarily, be defined as "the choosing between two rights where there is a clear

The Doctrine of Election explained and

illustrated. B. L. 1910 (Jan.) 1918 (Jan.) 1924 (Jan.) 1930 (Jan.), 1930 (Nov.) All. 92, 99; 1921, 1925 (Ext.), 1926 (Ext.) Mad. 05, 08, 1914 Bom. 1901. "A person cannot accept and reject the same instrument." Discuss by reference to the provisions of the T. P. Act. B. L. (Int.) 1923 (Jan.) 1925 (Jan.)

intention that both were not intended to be enjoyed." The foundation of the doctrine is the *intention* of the transferor and its *characteristic* is the effectuation of a transfer of property not *belonging* to him (see *Dillon* v. *Parker*, 1 Swans, 359, 385). The principle of the doctrine is that "a donee shall not be allowed to *approbate* and *reprobate* and that if he *approbates*, he shall do all in his power to confirm the instrument which he approbates."—*Cavendish* v. *Dacre*, 31 Ch. D., 466.

Sec. 35. Occasion for election arises where a person professes to transfer property which he has no right to transfer, and, as part of the same transaction confers some other benefit on the owner of the property. Such owner must elect (i.e, make a choice) either to confirm the transfer or to dissent from it. If the owner *elects* to dissent from the transfer he must relinquish the benefit which was conferred on him by the transferor and which after relinquishment is to revert to the transferor or his representatives-in-interest. This doctrine holds good even when the transferor is aware that the property transferred is not his own.

Write a brief note on the doctrine of Election as embodied in T. P. Act. Does a transferee by electing to take under a conveyance altogether forfeit his right to his own property also conveyed by the same instrument? B. L. (Int.) 1925 (July.)

Under the following circumstances the benefit relinquished by the elector-owner (*i.e* the refractory transferee) will not fully revert to the transferor; but compensation will be paid out of it to the disappointed transferee to the extent of the value of the property sought to be transferred to him :—

(1) When the transfer is for consideration ;

(2) When the transfer is gratuitous and the transferor has, before election, died or become incapable of making a fresh transfer *

Illustration:—A by an instrument transfers C's property worth Bs. 800 to B giving at the same time Rs. 1000 to C. C elects to dissent from the transfer by retaining the property and therefore forfeits the gift of Rs. 1000 If A dies before election, his heirs must, out of Rs. 1000. pay Rs. 800 to B, the disappointed transferee.

Note the difference between the doctrine of Election as laid down in T. P. Act and the English Law. Mad. 05, 08.

It may incidentally be mentioned that the English law of Election is somewhat different from the Indian law. In England, C (in the above example) electing against the transfer will not *forfeit* the gift altogether. He will get Rs. 200, that is, the amount that remains after compensating B. While in India, as we have seen, this amount of Rs. 200 reverts to A's heirs. In short, in India the doctrine of *Forfeiture* is applied, while in England they apply what is known as the doctrine of *Compensation*, that is, the person electing against the transfer gets what remains after compensating the disappointed transferee. A person taking no benefit directly under a transfer but deriving a benefit under it indirectly, need not elect. A person who in his one capacity, takes a benefit under the transaction may in another dissent therefrom.

Discuss with with illustrations the principle underlying the doctrine of Election. B L. (Int.) 1930 (Jan.)

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* If the transfer is for consideration, the disappointed transferee always gets compensation. In the case of a gratuitous transfer he gets compensation only if the transferor dies before election or becomes incapable of making a fresh transfer. This is so because if the transferor survives, he may himself make a fresh transfer in favour of the disappointed transferee; if he does not do that it is to be understood that he has no intention to confer any benefit on the disappointed transferee.

Thus, an estate is given to C for life and afterwards to D, his son. Now, A transfers C's life-estate to B and gives C, Rs. 1000, A dies, and shortly after him C dies without election. D as administrator of C's estate elects to take Rs. 1000 under the transfer and pays to B the income of the estate during the interval betwnen A's and C's death. In his individual character D may retain the land as there is a gift over in his favour after the termination of C's life-interest.

The preceding rules are limited by the following conditions :—

Exception to the rule of Election. **B. L. Int,) 1928 (July.)**

(1) The Elector owner or refractory transferee is to relinquish only that benefit which is in lieu of his property and no other : (Sec. 186, Ind. Succession Act, 1925).

When acceptance amounts to Election.

(2) Acceptance of the benefit by the elector-owner will amount to election if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

(3) Such knowledge or waiver will be presumed if the elector-owner enjoys the benefit for two years without dissenting.

Election by conduct.

(4) Such knowledge or waiver will be inferred when by an act of the elector-owner the whole situation is changed and the parties cannot be restored to their original position, *e.g.*, A gives C's property to B and gives C a coal mine ; C ex-

hausts it : his acts amount to confirmation of the transfer.*

If the elector-owner fails to signify *within one year* after the transfer his intention to confirm or to dissent from it, the transferor or his representatives may after that period require him to make his election ; and if he does not comply with his requisition he will be deemed to have elected to confirm.

N. B.—In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Q. The farm S is the property of C and worth Rs. 800. A by a registered instrument professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C refuses to make over the farm to B. Discuss the rights of B and C respectively with regard to the properties, (*a*) where the transfer to B is a gift and (*b*) where it is for consideration. (B. L. Int., 1921, July)—*Ans.* : (*a*) C forfeits the gift of Rs. 1000, (*b*) C forfeits the gift of Rs. 1000, out of which Rs. 800 will be given to B.

Sec. 36. Apportionment : In the absence of a *contract* or *local usage* to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of such interest of the person entitled to receive such payments, be deemed, *as between the transferor and the transferee* to B. L. (Int.) 1924 (Jan.)

* Read the case of *Saddik Hussasn* v. *Hashimali*, 38 All., 627 = 25 C. L. J. 363 (P. C.) where it has been held that where the elector has already created substantial interests in favour of strangers in property which he would lose by the election, the stranger's rights are not affected by such election.

accrue due from day to day, to be apportionable accordingly, but *to be payable on the days appointed for the payment thereof.*

B. I. 1918 (Jan.). A property is subject to a lease reserving yearly rent, each year's rent being payable on the 30th June of that year. The lessor sells the property to A on the 1st June, 1911. What are the respective rights of the lessor and his transferee in respect of the rent for the year 1911, (*a*) as between themselves, and (*b*) as against the lessee ?—(*a*) The transferor will get rent up to May and the transferee for the rest of the year, calculated on a *daily* basis ; (*b*) Sec. 36 applies as between the transferor and the transferee. It does not relate to the duty of the lessee. The obligation of the lessee will be discharged under Section 109 by paying to the lessor's transferee the rent which falls due after the transfer on the *day appointed for the payment thereof, i.e.,* 30th June.

The section applies only *in the absence of a contract* or *local usage.* So if there is a contract between the parties or a custom to the effect that either the transferor or the transferee shall receive the entire rent, no question of apportionment arises. A question of apportionment arises only as between the transferor and the transferee. A landlord dispossessing a tenant in the middle of a year cannot ask for apportionment of the rent for the periods of possession and dispossession. This section is not applicable to such a case. The landlord's entire rent will be suspended for the dispossession.

The principle of Sec. 36 embodies a rule of justice, equity and good conscience and can be applied to apportion the rent as between the lessee and the purchaser of his right in execution though execution sales are excepted from the operation of T. P. Act by sec. 2 (*d*) ; 41 Mad., 370.

As to **apportionment of rent,** the student is advised to read *Satyendra Nath* v. *Nilkanta Singh*, 21 Cal., 383.

A tenant, when sued for rent, executed a *solehnama* on the basis of which a decree was subsequently passed and

the tenant's *Jote* was sold in execution, the sale being confirmed on 23rd Sraban, 1296. The auction purchaser was afterwards sued for the rent of 1296, B. S. *Held* that he was liable for the whole instalment of rent accruing due after the date of his purchase, (though before the confirmation of the sale), notwithstanding that his title was not perfected until the latter date. Rent is to be regarded not as accruing from day to day but as falling due only at stated times according to the contract of the tenancy, or, in the absence of any contract, according to the general law laid down in section 53 of the B. T. Act. Read also 35 Cal., 786 ; 28 C. W. N. 1039 ; 5 Rang. 803.

Sec. 37. When in consequence of a transfer, property is divided into shares and is held by several owners, the benefit of any obligation relating to the property as a whole shall be divided and performed in favour of each of such owners in proportion to the value of his share. But if the obligation be incapable of division, or if by division its burden be substantially increased then it is to be discharged in favour of one owner only who has been nominated for the purpose by the rest. The person on whom the burden of obligation lies will not be separately accountable to the co-sharing owners unless he has had reasonable notice of the severance.

Apportionment of benefit of obligation of severance.

A (lessor) sells a house (of which E is a lessee and pays Rs. 40 as rent) to B, C and D. B supplies half the purchase money and C and D a quarter each. Therefore, according to the above principle E *on having notice of it* is bound to pay Rs. 20 to B and Rs. 10 to each of C and D. Again, if E (lessee) were to give the lessor as rent a cow as

well, then on transfer and severance between B, C and D, E is to deliver the cow according to their joint direction. Moreover, if E, as a term of his lease, agreed to do 4 days' work for the lessor, then after the transfer he should not do more than two days' labour in favour of B and 1 day's in favour of each of C and D; otherwise his burden will be substantially augmented (B. L. Int., 1921, July).

Transfer of immoveable Property.

Transfer by person authorised only under certain circumstances to transfer.

Sec. 38. Where any person, authorised only *under circumstances* in their nature variable to dispose of immoveable property, transfers such property *for consideration*, alleging the existence of such circumstances, they (*i.e.*, those circumstances) shall, as between the transferee, on the one part, and the transferor and the other persons affected by the transfer on the other part, be deemed to have existed, if the transferee *after using reasonable care* to ascertain the existence of such circumstances, has acted in *good faith.*

Illustration : A, a Hindu widow whose husband has left collateral heirs, alleging that the property (a field) held by her as such is insufficient for her maintenance, agrees to sell a part of such property to B, who satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed. B. L. (Int.), 1924 (Jan.).

The conditions necessary to

In order to make this section applicable the following elements should be present,—(1) the

transferor has a limited power of alienation over a property ; (2) the transferor is, under *special* circumstances, authorised to dispose of such property, (3) the transferor transfers the property *for consideration*, (4) the transferor must allege the existence of such *special* circumstances at the time of the transfer ; (5) the transferee must use reasonable care to ascertain whether these circumstances exist or not ; (6) the transferee must act in good faith and must honestly believe in the existence of the special circumstances. So when a transfer is made and all these conditions are fulfilled, an unrebuttable presumption will arise in favour of the existence of the alleged special circumstances.

give rise to the presumption contemplated by this section.

The "special circumstances" which authorise a transfer under this section vary with various transferors. The Hindu widow, the common manager or the *karta* of a Hindu family, a guardian, an executor or a trustee, a mortgagee, a mutwali, and a shebait, are all *authorised to dispose of immoveable* property under certain circumstances. But the circumstances justifying transfers by them are not the same in all these cases. It is not necessary that such special circumstances should *actually exist in* order to validate an alienation. This section has been enacted to protect the transferee if it subsequently transpires that the alleged special circumstances did not exist as a matter of fact and he has been deceived. It will be sufficient if the transferor *alleges* their existence and the transferee has *honestly satisfied* himself of it. The transferee will be protected if he exercises good faith, no

matter whether he is negligent or not. Thus, where the guardian of a minor mortgages the minor's property alleging necessity, and the mortgagee after *bona fide* enquiry is satisfied of it, the latter will be protected even if he does not see to the application of the money, 26 Bom. 433.

The most common case of authorised alienation under special circumstances is that of a Hindu widow disposing of the *corpus* of her husband's estate. A Hindu widow has no absolute interest in the property left by her husband; she can enjoy such property but cannot ordinarily deal with it in a way prejudicial to the interests of her reversioners. In order to sustain an alienation by her she must allege *legal necessity*, *e.g*, paying off her husband's debts, or performing his *sradh* ceremony or a pilgrimage to Gaya or her own maintenance and it will be enough if the transferee after *reasonable* enquiry has believed its existence.

Transfer where a third person is entitled to maintenance.

Sec. 39. Where a third person has a right to receive maintenance, or a provision for advancement* or marriage, from the profits of immoveable property, and such property is transferred the right may be enforced against the transferee, if he has notice thereof, or if the transfer is

* An advancement is a provision made by a parent for a child during the parent's life, by gift of property which the child would be entitled to as heir after the parent's death. The English doctrine of advancement, which is often called in aid to support transactions in favour of wife and children in England has not been accepted in this country. So, a transaction in the name of a wife or a child in this country cannot be saved from the taint of *benami* by recourse to a theory of advancement, see 39 C. L. J. 140; 42 I. A. 202, P. C. and 29 C. W. N. 1013, P. C.

gratuitous, but not against a transferee for consideration and without notice of the right, *nor against such property in his hands.*

If a person other than the transferor or transferee of immoveable property has a right to receive maintenance or a provision for advancement or marriage out of the profits of immoveable property transferred, under what circumstances and upon what conditions can such right be enforced against the transferee? B. L. 1904.

The section lays down that where a *third* party has a right to receive maintenance or a provision for advancement or marriage out of the profits of a certain immoveable property which is subsequently transferred, the right of such *third* party can be enforced against the transferee, (i) if the transferee had notice thereof, although the transfer was for valuable consideration and (ii) if the transfer was a gratuitous one, irrespective of the question whether the transferee had or had not notice of the right. Thus, a *gratuitous* transferee has no protection against the maintenance-holder; and a transferee for consideration has protection only if he takes the transfer *without* notice of the right of the persons entitled to maintenance or for whom provision for advancement has been made. Prior to the amendment of 1929, the maintenance-holder could not enforce his claim against a transferee for value unless he proved that the transfer was effected with the *intention* of defeating his right. So, the Courts always required proof of the transferor's *intention*. But it was not easy to adduce proof of mere *intention*. It was pointed out in 12 Bom. L. R. 1075 (1078) that unless a transferor openly announced his fraudulent intention of defeating the right of maintenance or the provision for advancement, it was not possible to prove the evil intention, and therefore the section as it stood then afforded

little protection to the persons entitled to maintenance or for whom provision for advancement was made. The Legislature thought it fit to give greater protection to such persons and omitted the condition as to proof of intention. Under the present section the position of the maintenance-holder or the person for whom provision for advancement has been made, has become better secured than before inasmuch as now such a a person can proceed against the transferee even in the absence of *fraudulent intention* on the part of the transferor. Therefore, whatever might be the motive of the transferor, the mere fact that the transferee takes with notice of the outstanding right makes him liable therefor.

Formerly mere notice of the outstanding right was insufficient to fix the transferee with liability, but now it is sufficient.

The question of the notice is one of fact and should be gathered from *all* the circumstances of of the case.† No question of *notice* arises in the case of a gratuitous transfer; the gratuitous transferee whether tainted with notice or not, has absolutely no protection whatsoever against the holder of the outstanding right. A gratuitous donee cannot come and plead ignorance of the claim. The section will not affect a transfer of a *portion* of the property, if the remaining portion be sufficient to cover the maintenance expenses in question.

Ram Kunwar v. Ram Dai, 22 All., 326.

In a suit under this section a *bona fide* purchase for valuable consideration without notice of the claim of the third party is always a good plea,

† *Ram Kunwar v. Kam Dai*, 22 All., 326.

but in order to be available it must be specifically alleged in the pleading, 21 W. R., 70. The equitable doctrine supporting this principle is that where there is equal equity the law must prevail. But when the *purchase* is tainted with notice or is without consideration, equities cannot be said to be equal, and the transferee cannot have any protection. A *bona fide* transferee for valuable consideration without notice gets the property free from all rights to maintenance or other provisions. So, if such a transferee reconveys the property, all the subsequent and remote transferees take it free from all outstanding claims to which the property was originally subject even when they are affected with notice. Once the equity attaching to the property has been purged off by a *bona fide* purchase without notice, the property continues free in the hands of all subsequent transferees whether affected with notice or not, that is, once it is free it is free for ever ; see p. 17 *ante*.

The *bona fide* purchaser without notice purges off the claims from the property and may transmit it in a free condition to transferees with notice.

In order to apply this section the right to receive maintenance, etc., should be from the profits of immoveable property, that is, it should go with the property, and not merely be a *personal* right against the owner or holder of the property. Two other conditions should be noticed in this connection : (1) The person protected by this section has no *proprietary* interest in the property, nor has a charge upon it ; he has a mere right to be satisfied *from the profits* of the property ; (2) the person so protected is a *third* person, *i.e.*, a person other than the transferor and the trans-

The right of maintenance should run with the property and should not merely be a personal right.

The section does not apply to the case of decree creating charge on property.

feree. When a widow's right of maintenance is made a charge for a fixed sum upon her husband's estate by a *decree*, it becomes a right *in rem*, and as such is available against all the world, even against a *bona fide* transferee for valuable consideration without notice.* Where the maintenance is made a charge by agreement, sec. 100 applies.

Sec. 39 applies in the case of a purchase for value if tainted with notice.

Problem 1 : Where immoveable property, from the profits of which a Hindu widow was entitled to receive her maintenance was sold, and the sale-deed recited that the amount of maintenance would continue to be paid to the widow by the vendor and that the property sold would not be subject to any charge for it, the mere recital would be sufficient to make the purchaser liable for the widow's claim ; the contrary view taken in the undermentioned cases is no longer good law †.

Problem 2 : Is the right of a Hindu widow to maintenance protected under the T. P. Act ? Is the right liable to be defeated by a transfer of the deceased husband's estate, where the transferee is a *bona fide* purchaser for value (i) with knowledge, (ii) without knowledge, of the widow's claim ?—Cal. 1920 (July).

Ans. The right is protected under *certain* circumstances and *not always*. (i) As the transferee is a *bona fide* one, it can be assumed that he has no notice of the widow's claim, so he is not within the mischief of Sec. 39 ; (ii) Absence of such knowledge always protects the transferee for value.

Transfer of land burdened with obligation imposing restriction on use of land or with obligation arising

Sec. 40. Where for the more beneficial enjoyment of his own immoveable property, a third person has, *independently of any interest in the immoveable property of another or of any easement thereon*, a right to restrain the enjoyment *in a*

* See *Ram Kumar* v. *Ram Dai*, 22 All. 326.

† *Digambari* v. *Dhan Kumari*, 10 C. W. N. 1074=4 C. L. J. 476 ; *Ram Kunwar* v. *Ram Dai*, *supra*.

particular manner, of the latter property or, where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immoveable property, but not *amounting to an interest therein or easement thereon*, such right or obligation may be enforced against, (1) a transferee with notice thereof, or (2) a gratuitous transferee of the property affected thereby, but *not against a transferee for consideration* and *without notice of the right or obligation, nor against such property in his hands.*

Out of a contract and annexed to ownership but not amounting to interest or easement.

Against whom the right is enforceable

Illustration : A contracts to sell Sultanpur to B. While the contract is still in force, he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.—B. L. (Int.) 1924, (Jan).

Q. A contracts to sell an estate to B who pays Rs. 1000, in advance. Before conveyance, A sells by a registered deed to C who has notice of the contract. What is the remedy which B has against either A or C ?—B. L. (Int.) 1918 (Jan.).—*Ans.* B may enforce the contract against either of them.

The amendment effected in the section is in accordance with the recent judicial opinion that it is the *negative* or restrictive covenants only that can be specifically enforced against a third person. As the *affirmative* covenants are not within the scope of the section, the words " to compel enjoyment in a particular manner ", which occurred in in the section prior to 1929 and which referred to *affirmative* covenants, have been omitted. This section protects certain rights of a *third* party (which before the transfer were enforceable against

Scope of this section.

the transferor) against the transferee with notice of the same and against a gratuitous transferee. The rights so protected are either—(1) the rights existing for the more beneficial enjoyment of the land of the person entitled and imposing restriction on the enjoyment of the land which is transferred; or (2) the rights arising out of a contract betwen the person entitled and the owner of the property which is transferred, and involving an obligation on the latter. But these rights should be independent of, or should not amount to, (*a*) interests in immoveable property and (*b*) easements. By 'an interest in immoveable property' is meant a *right in re aliena*, *i.e.*, an estate carved out of full ownership, *e.g.* a mortgage. Such an interest involves some notion of ownership though not an *absolute* ownership (see *infra*). A transferee taking a property subject to such an interest or subject to an easement right is bound thereby and no question of notice arises in their case. Therefore, an exception is herein made in favour of (i) interest in immoveable property and (ii) an easement. No question of notice arises also in the case of a *gratuitous* transferee; he is always bound by the restrictive convenant or obligation, no matter whether he knew of it or not. It must be noticed that a right to restrain enjoyment in a particular way or an obligation arising of a contract with respect to immoveable property has nothing to do with the ownership of the property. A contract for the sale of immoveable property does not amount to an *interest* therein; at best, it creates

only an obligation "annexed to ownership" and nothing more [*vide* under heading "Contract for Sale" under sec. 54]; it therefore comes within the purview of this section; see illustration at p. 97. A contract for pre-emption also seems to come under this section and can therefore be enforced agains all gratuitous transferees and transferees with notice of the contract though for consideration *, Cf. p. 50, *supra.*

It should be noticed that this section deals with what are known in the English law as **Restrictive Covenants**, and which are *equitably* enforced against all transferees *with notice* of the covenants or gratuitous transferees, but not against a transferee for consideration without notice. Such covenants are unconnected with the enjoyment of land, and therefore they cannot be annexed to it. They are enforceable only on equitable principles and not as a part of the law of property. In fact they do not run with the land, and should be contradistinguished from what are called covenants running with the lands. So Cresswell J. has said in *Ackroyd* v. *Smith*, 10 C. B. 164, (in which an abortive attempt was made to create a right of way unconnected with the enjoyment of land), that "it is not competent to a vendor to create rights unconnected with the enjoyment of land and to annex them to it." As they cannot be annexed to the land, it necessarily follows that they cannot run with it. A

It is not competent to a vendor to create rights unconnected with the enjoyment of land and to annex them to it"—Discuss. B. L. (Int.) 1923 (Jan.).

**Basideo Rai* v. *Jhagru Rai*, 46 All., 333=21 A. L. J. 265. Cf. *Jagamayya* v. *Tulsa*, 41 All., 12.

covenant between vendor and vendee to pay the purchase money in a particular manner does not run with the land, 39 C. L. J. 532 ; 28 C. W. N. 271. The *restrictive* covenants should also be distinguished from the covenants in the nature of easements.

B. L. (Int.) 1910 (Jan.) 1928 (Jan.)

Tulk v. Moxhay, (2 Ph. 774) : A was the owner of a vacant piece of land and also the houses surrounding it. He transferred the land to one B, binding him by a condition that he would keep the land in an open state, uncovered with buildings. Thus, A had the right to restrain enjoyment of the land, in a particular manner. Subsequently, one C purchased the land from B *with notice* of A's right on account of the restrictive covenant. C attempted to erect buildings, but was restrained by an injunction. [*N.B.* If here C instead of purchasing the land had received a gift of it, he would have been bound by the restrictive covenant irrespective of the question of notice.]

N.B. The doctrine of *Tulk* v. *Moxhay* only applies to restrictive covenants and not to *affirmative* covenants compelling a man to do an act of a positive character, *L. S. W. & Co.* v. *Gomm*, 20 Ch. D., 562. Similarly in *Haywood* v. *Brunswick P. B. Building Society*, 8 Q. B. D. 403, it was observed that a covenant to repair is not so *restrictive*, but can be enforced only "by making the owner put his hand into his pocket" ; therefore, an assignee of a person, to whom land is granted in fee in consideration of a rent-charge and a covenant to repair, is not liable, either at law or in equity, on the ground of notice to the assignee of the grantor on the covenant to repair ; see also *Hall* v. *Ewin*, 37 Ch. D. 74, and *Austerberry* v. *Corporation of*

Oldham, (1885) 29 Ch. D. 750. In this latter case, a covenant to spend money on the land was held as not binding on the purchaser of the land, although he had notice of the same. It may be remembered (p. 42) that as between a transferor and his transferee both affirmative and restrictive covenants may be enforced. But as against third parties (e.g. assignees of the parties to the transfer), only the restrictive covenants cannot be enforced, provided the assignment is with notice or is gratuitous.

What are covenants, which are generally presumed to run with the land? B. L. (Int.) 1914 (July).

Covenants running with the land: "A covenant is said to run with the land, when either the liability to perform it or the right to take advantage of it passes to the assignee of land"--*Dr. Gour*. For example, a covenant in a lease for renewal thereof is one running with the land and may be enforced against *all* transferees. Similarly, a covenant for title (in case of a sale) *runs with the land* and enures for the personal benefit of the buyer as well as for any other person to whom the buyer has re-transferred the property, It should be noticed that the covenants running with land are different from (i) the restrictive covenants (contemplated in Sec. 40) which bind only transferees with notice and gratuitous transferees, and from (ii) the covenants in the nature of easements which avail against all the world irrespective of notice. Covenants dealt with in this section are enforceable only on equitable considerations, and that is why the question of notice is paramount in their case. When a restrictive covenant has been so fastened to a piece of land that it may be said to have inhered in it, a presumption may arise that it runs with the land and passes by an assignment of the land. This presumption though rebuttable is not defeated by the plea of the purchaser's ignorance. The T. P. Act does not deal with these running covenants which are so very common in the English law. In order to ascertain whether a covenant is a mere *restrictive* one or *runs* with the land, we must see (a) whether it directly relates to the

What do you mean by "covenants running with the land"? B. L. (Int.) 1919 (Jan.) 1922 (Jan.) 1923 (July) 1924 (Jan.)

land so as to be part and parcel of the demise, or (b) it is a mere personal covenant and not specifically emphasised the purpose of binding all assignees.* A covenant by which the covenantor restricts the ordinary user of his property does not run with the land and is not binding on a purchaser without notice, 45 Bom., 170. An express covenant not to transfer the land without the consent of the landlord is a covenant running with the land.† A positive (affirmative) covenant in a *putni* lease providing that on a requisition from the lessor the lessee would reconvey certain lands comprised in the lease to him does not run with the land.‡

Problem : A grants a vacant piece of ground in fee to B in consideration of a rent charge and in the deed a covenant is inserted that the grantee shall build on the land and keep the building so erected in good repair. A subsequently assigns his interest in the land together with the benefit of the covenant to C. B builds on the land but fails to keep the house in good repair : can C maintain an action against B to enforce the covenant to repair ? (Mad. 1899).

Ans : The facts of the above problem are taken from *Haywood* v. *Brunswick P. B. Building Society* ; *vide* above.

Under what circumstance is a transfer by an ostensible owner of immoveable property binding on the real owner ?
B. L. (Int.) 1915 (July) 1920 (Jan.) 1925 (July) 1926 (July) All. 1896. All. 1921.

Sec. 41. Transfers by ostensible owner :

Where, with consent, express or implied, of the persons interested in immoveable property, a person is the *ostensible owner* of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it ; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

* Read Gour's T. P. Act, 6th Ed., p. 436 ; also 36 Cal., 675=9 C. L. J, 523.

† *Saradakripa* v. *Bepin Chandra*, 37 C. L. J. 538.

‡ *Jogesh Chandra* v. *Asaba Khatun*, 44 C. L. J. 220.

In order to make the section applicable the following conditions have to be satisfied :—(1) the transferor is to be the *ostensible* owner of the property with the consent, express or implied, of the persons *really* interested in the property ; (2) the transfer is made *for consideration* ; (3) the transferee has acted in good faith after taking *reasonable* care to ascertain that the transferor had power to make the transfer.* The underlying principle of this section is the same as that of estoppel enunciated in Sec. 115 of the Evidence Act, and was for the first time clearly recognised in the P. C. case of *Ram Coomar* v. *Mc Queen*, 11. B. L. R., 46 where their Lordships have observed—

What are the conditions under which a transferlof property by a person without title may be binding on the real owner ? B. L. Int. 1921 (Jan.) 1929 (July) 1930 (Jan.) All. 1923.

***Ram Coomar* v. *Mc. Queen*, 11 B. L. R. 46.**

"It is a principle of natural equity, which must be universally applicable, that, where one man allows another to hold himself as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something that amounts to constructive notice, of the real title, or. that there existed circumstances which ought to have put him upon an enquiry which, if prosecuted, would have led to discovery of it." [See 36 C. L. J. 9 (17)].

The underlying principle. 1929 (Jan.)

Explain and illustrate the rule of Equitable Estoppel as regards a transfer by an ostensible owner. All. 1925 (Ext.)

Benami transactions afford the best illustrations of the application of this section. When a *benamdar* sells the *benami* property for consideration

A *bona fide* purchaser from a

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* *Cf. Gholam Sidhique v. Jogendranath*, 43 C, L. J. 452=31 C. W. N. 205 ; *Macneil & Co.* v. *Saroda Sundari*, 85 C. L. J. 374=38 C. W. N. 526; *Jogendra* v. *Salamat*, 33 C. W. N. 994 ; *Mahomed Safi* v. *Mahomed Said*, 52 All. 248.

benamdar acquires a good title.

Under what circumstances and upon what principle does a transfer by a benamdar pass a good title? B. L. 1909, 1922 (Jan.).

without disclosing the real owner, the latter if he remains in the back ground cannot avoid the alienation without showing that the purchaser was tainted with notice of the *benami* and had no good faith. It should be noticed that the section contemplates only transfers *for consideration*. Gratuitous transfers are altogether outside its scope. The case of *Sarat Ch.* v. *Gopal Chandra*, 20 Cal., 296, which is a stock illustration of an estoppel, furnishes an instance of a transfer by the *ostensible* owner holding with the consent of the real owner. This is so because this section as seen above is virtually based on the rule of estoppel. If you make a false representation and some body else acts on that representation to his detriment, you must stand by that representation and cannot say otherwise. You cannot make another man suffer for your own fraud. If any body is to suffer, it is yourself. It is evident that a transferee from a Hindu widow cannot claim the benefit of this section, 46 All., 637.

When the true owner may be said to have given his consent.

The consent of the true owner must be *express* or *implied*; but mere quiescence or absence of interference on his part, while another man asserts ownership in himself, will not defeat his claim. Express consent presents no difficulty. Whether consent is impliedly given or not is to be gathered from the circumstances of each case. No presumption of implied consent arises in a case where there is no question of estoppel. The conduct of the true owner should be such as to cause the transferee to do something which he would not have done,

had not the true owner behaved himself in that way : 32 Cal., 357. The expression "reasonable care" in the section means such care as an ordinary man of business or a person of ordinary prudence would take, 43 C. L. J. 452 ; 49 C. L. J. 532 ; A. I. R. 1928 Mad. 778. The consent referred to here is the consent of the true *owner*. Therefore, consent of the owner's guardian may not do. A minor is incapable of giving consent and therefore the ostensible owner cannot transfer with his consent.

What would be the position if the real owner happens to be a minor? B. L. (Int.) 1921 (Jan.).

Mubarak-unnisa v. Raza Khan, 46 All., 377 : Some of several co-sharers are entered in the Revenue Records as owners of a property. They then effect a mortgage on the property as sole-owners in favour of A. A's title will be protected, under this section.

N. B. The section furnishes an exception to the general rule that no body can pass a greater interest than what he himself possesses.

[Q. X purchases a house in the name of his nephew Y. Y executes a mortgage in favour of Z and obtains Rs. 20,000. X has no knowledge of the transaction. Discuss the right of Z against X in the following cases giving reasons :—(*a*) Where Z acts in good faith without knowledge of the fact that X is the true owner and receives the title deeds from Y at the time of the mortgage : (*b*) Where Z makes enquiries and ascertains the following facts (*i*) that X has paid the entire purchase money, (*ii*) that X is in possession of the title-deeds, (*iii*) that X is paying all Municipal taxes and is realising all rents and (*iv*) that Y was never in possession of the house. B. L. (Int.), 1928 (July)—**Ans.** : (*a*) Z acquires a good title, (*b*) the transfer is viodable at the instance of X.]

Sec. 42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property

Transfer by a person having authority to revoke a

former transfer.

for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration : A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

Such a provision in a lease entitling the lessor to determine it on the breach of a condition is usually said to give the lessor a right of re-entry ; see Sec. 111 (g) (1).

It should be noted that this section applies only when the former transfer is revocable and the subsequent transfer is for consideration. It does not matter whether the first transfer is for consideration or not. No question of notice to any party arises in this section. Power of revocation may be exercised arbitrarily as well as subject to a condition, but when there is a condition attached to the exercise of the power it must have to be first fulfilled before there can be any revocation. A gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void and therefore there is no transfer at all, and the present section cannot apply to such a case.

Transfer by unauthorised person who

Sec. 43. Where a person *fraudulently* or *erroneously* represents that he is authorised to

transfer certain immoveable property, and professes to transfer such property *for consideration*, such transfer shall at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the *contract of transfer* subsists.

subsequently acquires interest in the property transferred. B. L. (Int.) 1924 (July). 1925 (July). All. 1921.

Illustration.—A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z repesenting that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition ; but, on B's dying, A as heir, obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him. Cf. 25 C. W. N. 320 = 33 C. L. J. 193.

State under what circumstances a transfer of an immoveable property by an unauthorised person may operate on any interest which he may subsequently acquire in such property. B. L. 1911, July, 1929 (July). 1930 (July).

The principle of this section is that if a person assigns a defective title but afterwards acquires a good title, the Court will make that good title available to make the assignment effectual.* The main requisites of this section are : (*a*) a fraudulent or erroneous representation or ownership ; (*b*) a transfer by the wrong owner ; (*c*) the transfer is for consideration ; (*d*) the contract of transfer must subsist. The transferee can exercise his option only during the continuance of the contract and only with respect to the interest which the *fraudulent* or *erroneous* transferor may acquire in such property. So, when the contract has subsided because of the repayment of the purchase-money the purchaser cannot exercise any option. Formerly, the section was restricted to the case of *erroneous* representation only. But as a *fraudulent* representation is none the less an erroneous representa-

* *Bhairab Ch.* v. *Jibon*, 33 C. L. J. 184.

tion (see 7 All. 864 ; 20 Cal. 296), it has now been *expressly* included in the section. There is however no estoppel when there is no representation.*

Where the section does not apply ? *i.e.*, the limitations to the above rule. 1924 (July).

This section, however, cannot impair the right of a *bona fide* purchaser for value without notice who makes his purchase prior to the exercise of the option reserved in favour of the previous transferee. The reason for this rule is that the previous transfer was not a *complete* transfer, as the transferor had then no complete title, but was something like a contract for transfer ; therefore, it would be but reasonable that a subsequent *bona-fide* transferee for value without notice will not be bound thereby. The same consideration will not apply to a subsequent gratuitous transferee. For example, in the above illustration if Z, the after-acquired interest of A, be sold by him to K, who takes without notice of C's option, K's rights will not suffer by reason of this section as he is a *bona-fide* transferee for value without notice and not a mere gratuitous one. Nor does it appear to be applicable to a case where a seller describes himself as entitled by virtue of inheritance on the death of A, and afterwards succeeds to the same property as the heir of B. "Where a man professed to sell as agent of a Hindu widow, and afterwards became her reversionary heir and sold to the plaintiff, it was *held* in a suit brought to set aside the first-mentioned sale, that this section did not

Would the above principle apply to a case where a person professed to sell as agent of a Hindu widow and afterwards became her reversionary heir ? B. L. 1911 (July).

* *Krishna Promoda v. Dhirendranath*, 56 I. A. 74=56 Cal. 813 =33 C. W. N. 289) (P. C.)

apply, because the plaintiff's vendor had not professed or purported to sell any interest except that of his principal, the widow, *Syed Nurul* v. *Sheosahai*, 20 Cal., 1. ;" Shephard and Brown. This section cannot be allowed to operate to validate a transfer which the law prohibits. For instance, a mortgage is made by a disqualified person on a property not belonging to him ; he subsequently becomes qualified and acquires interest in the property. Here, this section cannot be applied as it will validate a transaction which is otherwise invalid ; read also the recent F. B. decision of the Madras High Court which says that section 43 has no application to cases where the transfer is forbidden by law on grounds of public policy, *Vaddadi Sannamma* v. *Radhabhayi*, 41 Mad., 418 (F. B.). Cf. 48 Cal., 1, P. C. The section also does not apply where the transferee knew that the transferor had no interest in the property* or that the transferor's interest was inalienable. The principle of this section is applicable to cases of mortgage and exchange as well, 33 C. L. J. 184. The rule of this section applies only if the contract of transfer still subsists ; so where the contract is cancelled by mutual agreement or by suit, the section does not apply.

What is the principle which is sometimes referred to as feeding the

The principle of this section is sometimes referred to as **"feeding the grant by estoppel,"** *i.e.*, if a man who has no title whatever to property, grants it by conveyance which in form would carry the legal estate and he subsequently acquires an interest sufficient to satisfy the grant, the estate

* *Mulraj* v. *Indra Singh*, 48 All., 150.

grant by estoppel." B. L. (Int.) 1922 (Jan.) 1923 (July) 1927 (July).

instantly passes. An estoppel arises against him by reason of his conduct, and the law obliges him to *feed* that estoppel by his subsequent acquisition. It should be remembered that a conveyance of property not in existence operates as an executory agreement which attaches to the property the moment it comes into existence or is acquired. The above principle of feeding the estoppel has however no application to property which is inalienable by law, *e.g.* the expectant interest of a Hindu reversioner, see *Ananda Mohan* v. *Gour-Mohan*, 48 Cal., 536=25 C. W. N. 496 ; *Gurnarayan* v. *Sheolàl*, 46 Cal., 566=23 C. W. N. 521, P.C. Cf. 25 C. W. N. 49 (P. C.). There is a distinction between a transfer which is professedly one of a mere right, like a right of reversion or expectancy, and a transfer of specific property which the transferor erroneously or fraudulently represents as his, though in actuality he has only a reversionary right therein. Transfers of the former class would obviously fall within the purview of sec. 6 (*a*) and would be void *ab initio* while those of the latter class would be governed by this section. [See 130 I. C. 822 ; also Q. 4. below]. There is no estoppel where there is no representation, *Krishna Promada* v. *Dhirendra*, 56 I. A. 74=49 C. W. N. 112=33 C. W. N. 289 (P. C.)

Sulin Mohan v. **Rajkrishna**, 26 C. W. N. 420=33 C. L. J. 193 : A. B aud C were owners of a certain property in equal shares. On A's death his one-third share was inherited by his daughter, D. On 18th April 1904, D and C granted a lease of *entire* property to E as if B had no interest therein. Subsequently on 14th October, 1908. B died making a testamentary disposition of his one-third share in favour of D and C. *Held*, the doctrine of feeding the estoppel applied and the bequest by B to D and C was avaliable to satisfy E. (Cf. 33 C. L. J. 184).

Rashmoni Devi v. Soorjo Kanto, 2 C. L. J., 6 : The defendant as the mother and guardian of her infant son contracted to sell a piece of land to the plaintiff, undertaking to take out a certificate of guardianship and permission to sell from the District Judge within five months. The agree-

ment further provided for the refund of earnest money in case of the defendant's failure to obtain the necessary permission. The infant son died within the five months before the certificate could be applied for; the defendant succeeded to the property by right of heirship and refused to sell the property. In a suit for specific performance of the contract,—*held*, that there can be no decree against the defendant for specific performance of the contract for sale. Sec. 18 of the Spec. Relief Act has no application to a case where the defendant does not contract to sell the property as if it were his own, nor does Sec. 43 of T. P. Act apply to a case where there is no *erroneous* representation made by the defendant ; also read *Protab* v. *Judisthir*, 19 C. L. J. 108.

Q. 1. A mortgages a property to B, representing himself to be the owner, when he is in fact merely a reversionary heir expectant on the death of a Hindu widow in possession, C. B sues on the mortgage and obtains a mortgage decree. After the decree, C dies and A becomes the owner of the property. Can B sell the property under the decree? B. L. (Int.), 1927 (July).

Ans : B can not invoke this section as C's possession constituted knowledge of the real affairs on his part. But however as rightly or wrongly B has got a mortgage decree, that is binding on A and therefore the property can be sold.

[Q. 2. A Hindu reversioner in the life-time of the widow sells for valuable consideration some property inherited by her from her husband. After her death the revesioner as the heir of the husband brings a suit for setting aside the sale effected by him without offering to return the purchase money. What would be the result of the suit? Discuss (Cal. 1926, Jan.)—**Ans** : The sale here is virtually of *spes successionis* and is invalid as a contract. It can therefore be set aside, but only on refund of the money. If the reversioner represented that it was *his* property, sec. 43 would apply ; and the purchaser, at his option would get the property inherited by him.]

Q. 3. A Hindu widow is in possession of her husband's estate. Her daughter's son X sells his reversionary interest in this estate to Z. Ten years later the widow dies and X succeeds to the estate, Is the sale in favour of Z valid, and can he obtain possession of the property by suit ? [All. 1925, Ext.]. **Ans.** : Widow's possession constitute knowledge to Z, who purchases a mere *spes successionis*, and therefore the equitable principle of sec. 43 does not apply.

Q. 4. *A*, a Hindu, died leaving property *X*, a widow, *W*, who was his heir, and a brother *B* who was the presumptive reversionary heir. During the lifetime of *W*. *B* representing that he was the owner of it, sold *X* to *C* who obtained possession. After the death of *W* and when *C* was in actual possession of *X*, *B* sold it to *D*. Discuss the question of the rights of *C* and *D* respectively to the property. [B. L. (Int.) 1931, July] : **Ans.** : Here, B sells the property and not the mere expectancy (see 130 I. C. 822, at p. 110) ; therefore, he is bound to feed the estoppel in favour of C. The intervention of the third party (D) does not preclude the application of the section. as he is tainted with notice, because C's possession is notice to D.

Transfer by one co-owner

Sec. 44. Where one co-owner of immoveable property transfers his share, the transferee acquires as to that share, the transferor's right (1) to joint possession or other common or part enjoyment of the property, and (2) to enforce a partition of the same, but subject to the conditions and liabilities affecting it (at the date of the transfer).

But if the co-owner transfers his share in a dwelling-house belonging to an undivided family, the transferee, if he be not a member of the family, is not entitled to joint-possession. "It is a far safer practice to leave a purchaser to a suit for partition than to place him by force in joint posses-

sion with the members of a Hindu family which may be not only of a different caste from his own, but also different in race and religion".; *Per* Westropp, C. J. in 5 Bom. 499 at p. 504.

Q. One of two joint Hindu (Dayabhaga) brothers sells his share of the family dwelling house to an Englishman. Compare the original rights of the seller with the acquired rights of the purchaser with regard to the share.—B. L., (Int.), 1924 (July). *Ans.*: *Vide ante.*

Joint possession means that each co-owner has the right to possess the *whole* property along with the other co-owners. After partition, there is no right to joint possession of the whole property; each co-sharer has simply the right to possess the portion of the property allowed to him.

Joint transfer for consideration.

Joint transfers may take the following shapes; (1) The property may be transferred to two or more persons and the consideration for the transfer is paid out of a fund belonging to them in common: (2) The property being transferred to more than one person the consideration is paid out of separate funds belonging to the transferees, sec. 45; (3) When an *entire* immoveable property is transferred by person having *distinct shares,* sec. 46: (4) When a *portion* of an immoveable property is transferred by *co-owners,* sec. 47.

Sec. 45 contemplates two cases in which property has been transferred to more than one person for consideration without providing what interest each of the transferees is to take—(1) when the consideration money is paid out of a fund belonging to all the transferees: (2) when it is paid out of their separate funds. In the former case the transferees' interests in the property will

be *identical* with their interests in the common fund. In the second case the acquired interests will be *proportionate* to the fractional amount contributed by each transferee.

The principle of oint-tenancy does not apply to joint transferees

This section does not say in distinct terms whether the joint transferees in the above cases become tenants-in-common or joint-tenants. Joint-tenancy with the incident of survivorship is not widely known in this country and the only instance where the principle of survivorship is allowed is in the case of Hindu co-parceners. Ordinarily, the joint transferees cannot take among themselves by survivorship, but when the whole transfer is made with a condition that the transferees should take as joint-tenants, the principle of survivorship applies.

Presumption in favour of equality when arises.

When there is no evidence showing what interests the transferees have in the common fund, or showing in what proportion they have made their respective advances, the natural presumption will be that they are all *equally* interested in the property.

Transfer being made for consideration by persons having distinct interests the transferors share the consideration proportionately to their interests in the property. Mad. 1908.

Section 46 deals with the question of equitable **apportionment**. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are entitled to share in the consideration proportionately to the value of their respective interests.

Illustrations :—(*a*) A, owning a moiety, and B and C, each a quarter share, of Mauza Sultanpur, exchange an eighth share of that Mouza for a quarter share of Mauza Lalpura.

There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C to a sixteenth share in that Mouza: (*b*) A, being entitled to a life-interest in Mauza Atrali and B and C to the reversion, sell the Mauza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion, Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money; B and C to receive Rs. 400.

This section cannot apply unless the transferors have *distinct interests.* For the purposes of this section a life-estate and a reversion have been held to be distinct. Similarly, the life-tenant and the remainder-man have distinct interests.

N.B.—The above law is subject to contract between the parties and is therefore good so long as there is no agreement between them to the contrary.

Transfer by co-owners of a share in common property takes effect proportionately to the share of each

Sec. 47 contemplates a case where *a share* in an immoveable property is transferred by several co-owners and where there is no indication as to on which share or shares the transfer is to take effect. In such a case the transfer takes effect on the co-owners' shares equally where the shares are equal, and where they are unequal, proportionately to the extent of such shares.

Illustration:—A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share in Mouza S, transfer a two-anna share in the Mouza to D without specifying from which of their several shares the transfer is made. To give effect to the transfer, one-anna is taken from the share of A, and half-anna share from each of the shares of B and C.

N.B.—It should be noticed that in this section the transfer takes effect according to the extent of

the share of each co-owner and not according to the *quantum* of consideration received by each.

Priority of rights created by transfer.

Section 48. Where a person purports to create by transfer at *different times* rights in or over the same immoveable property, and such *right cannot all exist* or be exercised to their full extent together, each latter-created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Explain "He who is first in time is first in right." B. L. (Int.) 1924 (Jan.)

Thus, two successive transfers of the same property by sale or mortgage cannot co-exist, the latter in date must give way to the earlier. Or, where there are two incumbrances on the same property, the first incumbrancer must be first satisfied, and if necessary, he can exclude the second. The principle underlying this rule is one of natural justice and has well been expressed in the maxim, "*Qui prior est tempore, potior est jure*" *i.e.*, that which is prior in time shall prevail in law. This principle, it is to be remembered, will not apply unless the conflicting equities be otherwise *equal*, and special contracts (to bind earlier transferees) be wanting.

Explain and illustrate the maxim, "*Qui prior est tempore potior est jure.*" All., 20, Mad., 83 Bom., 1902. Cal. 1919 (Jan.)

Exceptions to the above maxim.

We may, however, note here a few exceptions to the rule that priority is determined by order of time :

1. Section 50 of the Registration Act which under certain circumstances gives priority to a registered mortgage over an earlier unregistered security. (*N.B.*—Now all mortgage *instruments* are to be registered, so now no question

of piority arises under Sec. 50 in cases of mortgages by instruments).

2. Another exception to the rule is *Salvage-lien, i.e.* advances made for the purpose of protecting a property from Revenue sale, forfeiture or destruction. For the priority of salvage payment, see 35 C.W.N. 1040=54 C. L. J. 125, P.C.

3. A subsequent incumbrance created by a common Manager appointed under Sec. 95 of the Bengal Tenancy Act and having plenary authority to act for all co-owners overrides a prior security created by one of such co-owners; (*Amarchand* v. *Shoshi*, 31 I. A. 24).

4. When a mortgage is constituted by an order of Court a first charge, it takes precedence over a prior mortgage.

5. Land Revenue falling in arrears subsequent to a mortgage takes precedence over it.

6. A Crown debt (even if subsequent) comes over all other debts secured or unsecured, (33 Cal., 1040).

7. When the prior incumbrancer misleads a subsequent incumbrancer by *fraud*, misrepresentation or *gross neglect*, his priority is postponed (see Secs. 3, 39 and 78).

8. When the priority is barred by estoppel.

The principle of this section does not apply unless there is competition or conflict between the two transfers. When the two transfers are so incompatible that both cannot stand it is only then that this principle is to be applied. Thus, for example, when one trānsfer is incomplete but the other is complete there is no competition or conflict between the two, *e.g.*, when one is a *contract for sale* and the other a *sale*, no question of priority arises. So again, there is no conflict between a mortgage and a subsequent purchase by another man who is willing to redeem.

When both the transfers are registered, priority is determined according to the respective dates of

execution and not of registration, so a prior transfer will not lose its priority simply because it was registered after the registration of the subsequent transfer.

B. L. (Int.) 1919 (Jan.) 1920 (July.)

If there be two mortgages, on the same day, of the same property in favour of two different persons, there being nothing to shew which was executed first, what would be the position and relative rights of the two mortgagees with respect to the property mortgaged? (Cal., 1919, Jan.; 1920, July). "Where two instruments are executed on the same day that which was executed first takes priority, but where it cannot be ascertained which security was executed first, the mortgagees would take as joint-tenants or tenants-in-common," Per Mookerji J. in *Ram Ratan Sahu* v. *Mahanta Sahu*, 6 C. L. J., 74, 82.

Transferee's right when the property is under a policy.

Sec. 49. Transferee's right under policy: Where immoveable property is transferred for *consideration*, and such property is *at the date of the transfer* insured against loss or damage by fire, the transferee, in case of such loss or damage, may require any money which the transferor actually receives under the policy, or so much thereof as may be necessary to be applied in re-instating the property.

N. B. *The provisions of this section may be altered by contract between the parties.*

The insurance of a house against fire is for the benefit of all persons concerned. So the benefit of an insurance must go to relieve the actual sufferer.

Insurance implies a contract of indemnity against actual loss and attaches to the property itself. So that if the transferor receives any insurance money he receives it as a trustee for the transferee who alone has the real and substantial interest in the money which ought to be laid out in re-instating the property. There is however a difference between the English and the Indian Law on this point. Under the English Law a contract of indemnity is a personal contract, and does not pass simply by an assignment of the premises, that is, it does not run with the land, as we commonly say; *Rayner* v. *Preston*, 18 Ch. D. 1.

It must be noticed that the insurance must be subsisting *at the date of the transfer*. The transferee has a remedy against the transferor only if the latter has actually received money from the Insurance Company. If he has not received any money or does not care to receive money, the transferee is helpless as he has no remedy against the Insurance Company for want of privity of contract between him and the Company. So it is always safer to take an assignment of the policy beforehand.

Garden v. *Ingram*, 23 L. J. Ch. 428

Mr. W. Stokes, the Draftsman of the T. P. Act has taken this section from the ruling in *Garden* v. *Ingram*, 23 L.J. Ch. 478. In this case the lessee (who took his lease *with a covenant* that the money obtainable from an insurance on the property must be applied in restoring the same in case of destruction) mortgaged his interest to the plaintiff. On the destruction of the mortgaged premises by fire, the plaintiff restored them and made a claim to the money on the policy. The claim was allowed. It should be noticed that the

basis for this decision was a *covenant* between the parties. Mr. Stokes perhaps lost sight of this fact and made the ruling a broad proposition of law.

Rayner v. Preston, 18 Ch. D. 1 : A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor against fire. *The contract contained no reference to the insurance.* After the date of the contract but before the time fixed for completion the house was damaged by fire ; *held* that the purchaser who had completed his contract was not entitled as against the vendor to the benefit of the insurance.

Holders under defective Titles.

Rent *bona fide* paid to holder under defective title.

Sec. 50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents and profits.

Illustration : A lets a field to B at a rent of Rs. 50 and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

But in the above illustration if B has notice of the transfer, his position is altered. Again, where a tenant pays rent to the landlord before it is due, he cannot claim protection from his landlord's transferee under this section, as then not being under an obligation to make his payment he created only a personal obligation against the landlord, and not any obligation running with the land. Rent here should be paid *as such* ; rent

paid in advance is a loan to the landlord and is not rent [see 9 Rang. 470.]. This section protects the *tenant* and not the *payee.*

It should be noted that the application of this section is not confined to cases of transfers only. It holds good in all the cases of defective titles. Thus, where a tenant holding a land from a person with a defective title is sued for rent by the true owner, payment to the former will be a good defence if he (tenant) had no notice of this superior adverse claim, *Kaveniamma* v. *Lingappa*, 33 Bom,, 96.

The remedy of the real owner in all these cases lies not against the tenants paying rents in good faith, but against the payees, *i.e.* the persons who receive the rents. Thus, where A sells his property to B, but does not deliver possession and continues receiving rents from the tenants who are ignorant of the sale, B's remedy will be against A and not against the tenants. The tenants cannot be charged with the rent twice ; (B. L. 1909.) B. L. 1919.

Improvements by transferees of defective owners.

Sec. 51. Where the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee is entitled to the costs of his improvements or to have the property sold to him at the then market price by the person causing the eviction.

But when such transferee instead of making any improvement has planted or sown (on the property) crops which are growing when he is

evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

The remedies of *bona fide* transferee of an owner with a defective title making improvements on the property, when evicted by the holder of a better title.
B. L. (Int.) 1913 (Jan.) 1921 (Jan.) Mad. 1905.

The section involves two main principles of law *viz.* (1) no person can pass off greater interest than he himself actually possesses ; (ii) he who seeks equity must do equity. A transferee of an owner with a defective title acquires no real interests in the property. But if he makes improvements on the property, believing in good faith that he is *absolutely entitled* thereto he will have *two alternative* remedies open to him when the real owner seeks to evict him ; either (1) he will be entitled to the costs of his improvements, or (2) he will be entitled to have the property sold to him at the market price irrespective of his improvements. This section cannot however apply unless the transferee made the improvements *in good faith.* Carelessness to make enquiries about the title will not make his conduct *mala fide.* But when the attending circumstances are such as to excite suspicion, omission to inquire may go to prove want of good faith. For instance, if an alienee from a Hindu widow makes no enquiries about the "legal necessity" for the transfer, he will not get the benefit of this section.* Again, the transferee cannot take the benefit of this section unless he believes that he is *absolutely entitled* to the property. Thus, where A in good faith taking a *lease* from a trespasser erects a house on the land and the real owner sues to eject him,

* *Hans Raju* v. *Somni*, 44 All., 66.

(B. L. 1909), he cannot say that he believed he was absolutely entitled to it. The real owner is not bound to give him his costs or to sell the property to him. A can, of course, under Sec. 108 (h), take away the fixtures without injuring the land. Similarly, the purchaser of the interest of a Hindu widow cannot say that he believed he was absolutely entitled so as to take benefit under this section. Planting of trees is not such an accession or improvement under sec. 63 or 63A for which the mortgagee in possession can get compensation or expenses ; he can of course remove the trees without injuring the land.

B. L. 1909.

No compensation for improvement made after discovery of the defective title.

The transferee is not also entitled to any compensation for the improvements made after discovery of the defect of title : "Where a purchaser for value is evicted in equity under a prior title he will be credited with all moneys expended hy him in necessary repairs or permanent improvements, *except improvements made after he has discovered,* the defect of title" : Dart's *Vendors and Purchasers*, 6th Ed., p. 1032. A claim for improvements cannot be upheld when they are improportionate to the value of the property, *Ramappa* v. *Yellappa*, 52 Bom. 307.

Q. A person purchasing a plot of land was put into possession of a greater area than he was entitled to, and effected in good faith improvements on the excess area. Whereupon the owner of that excess area sued him in ejectment ; will he be entitled to compensation ? **Ans :** Though the section does not in terms apply still the equitable principle thereof will apply to it. Cf. *Kalyan Das* v. *Jan Bibi*, 51 All., 454.

Discuss the doctrine of *Lispendens* as codified in Sec. 52 of T. P. Act. 1911 (July). 1915 (July). 1918 (Jan.). 1923 (July). 1927 (July.) 1928 (July.) 1930 (Jan.). All. 1923. All. 1925 (*Ext.*)

Sec. 52. Lispendens : During the *pendency* in any Court of competent authority of any *suit or proceeding which is not collusive* and in which any right to immoveable property is directly and specifically in question, the property cannot be be transferred or *otherwise dealt with* by any party to the suit or proceeding so as to affect the rights of *any other party* thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

The principle on which it is founded. B. L. 1911 (Jan.) 1917 (Jan.)

This is commonly known as the doctrine of *Lispendens* and is based on the Common law maxim "*pendente lite nihil innovatur*," *i.e.*, during a litigation, nothing new should be introduced. The real aim of this doctrine is to prevent multiplicity of suits. For, if immoveable property can be transferred during litigation, the successful party will have to commence a *de novo* proceeding against the

transferee, who in the meantime might have again transferred his interest subjecting the owner of the property to an interminable series of litigation. It (*lispendens*) rests upon this foundation that it would be plainly impossible that any action could be brought to a successful termination, if alienations, *pendente lite*, were permitted to prevail, 5 C. L. J., 563 (P. C.) The correct mode of stating the doctrine is to say with Cranworth, L. C., "*pendente lite*, neither party to the litigation can alienate the property in dispute *so as to affect his opponent*." So, we may here reasonably repeat that the principle of *lispendens* is not *based* on the *doctrine of notice*, but on the doctrine of finality in litigation.* See pp. 20-22, *ante*. Therefore, it is not necessary to consider whether the transfer was or was not taken with notice of the pending litigation.

What is the doctrine of *lispendens*? Upon what foundation does it rest? B. L. (Int.) 1912 (July.)

Write a brief note on the doctrine of *lispendens*. B. L. (Int.) 1931 (Jan.)

Distinction between *Lispendens* and *Res Judicata*.

The distinction between *lispendens* and *res judicata* may shortly be noticed as follows : To constitute *litis pendentia* there must be *litis contestatio*, *i.e.* to say, *lispendens* is in force so long as the contest *i.e.* the litigation goes on ; so, when the suit has ended by a decree or otherwise, the *lispendens* ceases to have any effect and the matter then becomes *res judicata*. In other words, *res judicata* commences where *lispendens* ends, of course, leaving out of consideration the execution stage. Both of them affect only those parties between whom there are a litigation and an adjudication ; see 41 Mad., 458 below : "The law of *lispendens* is an

* *Krishnabai* v. *Savalram*. 51 Bom. 37.

N.B. The new amended sec. 52 has no retrospective effect, A. I. R. 1931 Nag. 138.

extension of the law of *res judicata*, and makes the adjudication in the suit binding on alienees from the parties pending suit just as the law of *res judicata* makes the adjudication binding on the parties to the suit and on alienees from them after decree," 41 Mad., 458, at p. 463.

What are the elements necessary to constitute *Lispendens ?* B. L. (Int.) 1915 (Jan.) 1920 (Jan.).

Lispendens analysed : In order to constitute a *lispendens*, the following elements must be present :

(*a*) There should be a *suit* or a *proceeding* (which can be of *any* description) :

State and analyse the law laid down in T. P. A. regarding transfer of property pending a suit relating thereto. B. L. (Int.) 1924 (Jan.) 1928 (July).

(*b*) The suit or proceeding must be one in which a right to *immoveable* property is *directly* and *specifically* in dispute.

(*c*) The suit or proceeding must not be a collusive one.

(*d*) The suit or proceeding must be pending:

(*e*) A transfer of the property in suit during such pendency.

(*f*) The pendency of the suit or proceeding must be in a Court having authority in British India or established by Governor-General in Council ; that is, it must be pending in a Court of competent jurisdiction.

When a suit is said to be pending ?

Pendency : The new *explanation* to the section now defines the term. The pendency of a suit or a proceeding commences from the date of the presentation of the plaint or the institution of the proceeding in a Court of *competent jurisdiction.* The period during which a suit or proceeding remains pending in a wrong Court does not count for the purposes of this section. The pendency of the

suit or proceeding continues till it is terminated by a final decree or order (as the case may be) and complete satisfaction or discharge of such decree or order is obtained or becomes time-barred. So the mere passing of a final decree or order does not determine the pendency. A complete satisfaction or discharge of the decree or order must be obtained or the same must become unobtainable by reason of the law of limitation. Till the case reaches that stage there is *pendency*. It will be seen at once that the term *pendency* is now much wider than before. In *Bhawani* v. *Mathura*, 7 C. L. J. 1 (35), decided with reference to the old law, it was thus observed, "in the case of a mortgage-suit, the *lispendens* cotinues after the decree *nisi*, and the doctrine of *lispendens* is applicable to proceedings to realise the mortgage-money after the decree for sale." (Per Mookherji J.). An appeal is regarded as a continuation of the *lis* so as to bind a purchaser.* There is *pendency* even during the interval between a final decree and the institution of an appeal and a transferee during this period is bound by the doctrine of *lispendens*, because the decree of the appellate Court over-rides that of the original Court and before the decision of the appellate Court, the suit or proceeding cannot be said to have been disposed of by a *final* decree or order, far less can such final decree or order be said to be satisfied or discharged.†

Does '*Lispendens*' apply to an ordinary suit for recovery of mortgage money by the sale of the mortgaged property? B. L. 1910 (Jan.)

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* *Govoind* v. *Guru Churn*, 15 Cal., 94 : *Sree Krishnabai* v. *Savalram*, 51 Bom., 37.

† *Ghanshyam* v. *Ragho Sing*, 10 Pat. 234.

When a right to immoveable property is directly and specifically in question.

Application of the Doctrine: This doctrine applies with respect to an immoveable property only when a right to that *specific* property is *directly* in question, *i.e.*, there must be specific mention of the particular property in the plaint and there must be a distinct prayer about it. If the suit does not relate to the property in question, the doctrine does not apply. In order to make the doctrine of *lispendens* applicable, the *lis* must be sufficiently described in the pleading. Misdescription of property involved in the litigation, is sufficient to render the doctrine of *lispendens* inapplicable.* But this principle cannot be invoked by a person who has knowledge of the true state of things and is not misled by the misdescription.† It is not necessary that there should be a dispute about the right over the property. Thus, where a property is charged with maintenance but there is no dispute with respect to the right of maintenance charging the property, though the amount of maintenance is not admitted, the doctrine may be applied. But where in a suit for recovery of maintenance, no charge is claimed on any specific property, the doctrine does not apply. A suit on mortgage is a suit with respect to an interest in immoveable property, therefore alienation of the mortgaged property, during the pendency of the mortgage suit is not allowed.‡ A transfer during

Does Lispendens apply to an ordinary suit for recovery of mortgage money by the sale of the mortgaged property?—Yes: B. L. 1910 (Jan.).

* *Per* Mookherji J. in *Lokenath* v. *Achitananda*, 15 C. L. J. 391.

† *Bepin Krishna* v. *Priyabrata*, 26 C.W.N. 36=34 C. L. J. 256.

‡ *Shib Chandra* v. *Lachminarain*, 56 I. A. 339=50 C. L. J. 502, P. C.; also 8 C. L. J., 153; 1931 A. L. J. 729, F. B.

the pendency of a rent suit in which no question of title is involved is not affected by the doctrine.*

Faiyaz Husain v. **Munshi Prag**, 29 All., 339=5 C. L. J. 563 (P. C.): H executed a mortgage of a property in favour of N, in 1889. On the 13th July, 1891, N brought a suit on his mortgage but the summons in that suit was not served on H until September, 1891. Meanwhile, on the 15th July, 1891, H mortgaged the same property to M, who also sued on his mortgage, but did not make N a party to the suit. In the execution of the mortgage decree obtained by M, the property was sold in December, 1900, and purchased by F, who got possession In February, 1901, the property was again sold in execution of the mortgage decree obtained by N and purchased by himself. Can N recover the property from F, without letting him redeem ?—B. L. (Int.), 1914 (Jan.) :—*Ans* Yes ; the doctrine of *lispendens* will apply, and F is bound by the decree of N, and cannot ask to be let in to redeem.

The doctrine of *lis pendens* applies even when the real point for determination is between two defendants. A collusive suit is no *real suit* at all but merely a pretence (6 Bom. 73, 11 Bom. 708) and therefore cannot attract the operation of the doctrine of *lis pendens.* The doctrine applies to a suit decreed *ex parte* (*Bellamy* v. *Sabine* ; also see 13 C. W. N. 1138).

The doctrine of *lis* applies to transfers effected during the pendency of a suit or proceeding even when such suit is subsequently compromised, that is to say, even a consent decree is within the scope

Will a purchaser *pendente lite* be bound by a consent decree to which he is

* *Jaynal* v. *Hyder Ali*, 55 Cal. 791=32 C. W. N. 268.

no party ?—Yes: B. L. (Int.) 1927 (July).

of the doctrine of *lispendens*.* The word *transfer* is wide enough to cover all forms of transfers. The words "otherwise deal with" include a case of *partition*; therefore, the property in suit cannot even be partitioned during the pendency of the suit.

Persons affected by the doctrine.

It should be observed that *lispendens* affects all the parties to a suit or proceeding, so that neither the plaintiffs (or the petitioners), nor the defendants (or the opposite parties) against whom, or in whose favour, a final decree or order has been made, can deal with the property to the prejudice of *any other party*. By "any other party" is meant a party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation†. A mortgage being a form of transfer, this section applies to it as well. So that, during the pendency of a previous mortgage suit, a second mortgage cannot be created, nor can the equity of redemption be sold. In a recent case however‡ it has been *held* that where during the pendency of a mortgage suit the mortgagor mortgaged the property to A to pay off subsequent mortgages created before the institution of the suit, the mortgage to A was not affected by the doctrine of *lispendens*, the natural presumption being that A intended to keep those mortgages alive for his benefit. Here, A having

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* See *Annamalai* v. *Malayandi*, 29 Mad., 429, F. B.; als 34 C.L.J 96=25 C. W. N. 806.

† *Manjeshwara* v. *Vasudeva*, 41 Mad, 458.

‡ *Tarak Prasad* v. *Kristo*, 13 C.L J. 13.

given money (though during the pendency of the suit) to pay off subsequent mortgages, created before the institution of the suit, became subrogated to the rights of those mortgages which are obviously (being created before the suit) not affected by the doctrine. So there was no new transaction, nor dealing with the property. This section however does not apply to the actions of a stranger, who can transfer the property 'in question' without violating the doctrine. Thus, where A purchased certain property, regarding which a suit is pending in a Civil Court, from B, who at that time was not a party to the suit, B is subsequently added as a party defendant; the question is—how will A be affected by the rule of *Lispendens*, (Mad. B. L. 1913):—B was a "stranger" at the time of the sale; therefore, A is not affected.* A transfer *pendente lite* is not wholly void, but is simply subject to the results of the suit; that is, such a transfer does not prevail as *against* the successful litigant. If a transfer *pendente lite* is effected with the permission of the Court, such permission will protect the transfer from the mischievous effect of the section. The principle of *lispendens* has been extended to the involuntary sales as well—[even though involuntary transfers do not come under the operation of the T. P. Act by reason of sec. 2 (*d*), 11 C. W. N., 828]. See also *Mahadeo* v. *Thakur Prasad*, 11 C. L. J., 528, where it has been ruled that the doctrine of *lispendens*

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* See *Pethu Ayyar* v. *Sankara*, 40 Mad., 955.

applies to sales *in invitum*. See Ex. 1 below. It applies to pre-emption suits, *Bhagwan* v. *Nanak*, 49 All., 516. The section will not cover the case of an intervenor in execution proceedings against whom an order is passed and who has a further remedy in a suit under O. XXI, r. 63, because the order made in the execution proceeding is not *final*. The cases of review seem to be excluded from the section. The cases of intervenor and review are excluded from the doctrine as both of them are exceptional deviations from the normal procedure in a suit.

To what extent a transferee pendente lite is affected. B. L. Int.) 1931 (July.)

Position of a Transferee pendente lite : A transferee *pendente lite* is bound by the decree. He cannot re-open the questions already decided in the suit, which will operate as *res judicata* as against him. It is not necessary that he should be made a party in order to bind him by the decree: if it were otherwise, the whole suit will be defeated by successive transfers *pendente lite*, as every such transfer would then necessitate the introduction of new parties (29 Cal., 179, P. C.).* For example, A sued B for the recovery of the possession of some land and got a decree. During the pendency of the suit B had sold the property to C. How far did the sale affect the rights of A to the land under the decree, and how was he to proceed against C? (B. L. Int., 1916, July)—C will be bound as if the decree had been passed against him, and A can execute the decree against him for recovery of possession.

Ex. 1. A title suit is pending between A and B. C, a creditor of B, attaches the disputed property as belonging to B and gets it sold. D purchases the property without any notice of the litigation pending between A and B. A succeeds in getting a decree. Will it affect the title of D,

* Cf. *Jahar Lal* v. *Bhupendra*, 49 Cal. 495.

the auction purchaser? Cal. 1926 (July)—Yes ; *lis* applies to sales *in invitum, vide ante.*

Ex. 2. **Manjeshwara v. Vasudeva,** 41 Mad., 458 : In a previous suit by A to set aside a sale made by him to B as void and invalid and consequently to set aside a mortgage made by B in favour of C, it was *held* on the plea of B and C, that both the sale and mortgage were good. Pending that suit D bought B's rights in a Court auction.

In a subsequent suit by C to enforce the mortgage, *held* that D's purchase was not affected by *lis pendens*, as there was no contest between B and C in the previous suit as to the validity of the mortgage ; therefore D was entitled to impeach its validity in the subsequent suit.

Q. Does the doctrine of *lis pendens* apply in the following cases :—(*a*) A brings a suit against B for the establishment of his title to a property X. During the pendency of the suit, the property X is sold in execution of a decree aginst B ; after that A gets a decree. (*b*) A brings a suit for money against B ; attaches his property X before judgment. During the pendency of the suit the property X is sold in execution of another decree against B. A wins his suit and gets an order for sale of the attached property, [B. L. (Int.) 1931, Jan.]. *Ans* : (*a*) Yes ; (*b*) No.

Sec. 53. (*1*) Every transfer of immoveable * property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Fraudulent transfer.

Nothing in this sub-section shall impair the

* This section applies to *immoveable* property only ; so it may be contended that there being no statutory provision restraining transfer of *moveable* property in a state of insolvency, such transfer is not invalid But this contention has been negatived on the principles of justice, equity and good conscience, 30 Mad., 619.

What provisions are made in the T. P. Act for the protection of creditors and purchasers against fraudulent transfers? B. L. (Int.). 1911 (July). 1916 (Jan.)

rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

Old Sec. 53: Every transfer of immoveable property made with intent to defraud prior or subsequent transferees thereof for consideration or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor is voidable at the option of any person so defeated or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat, or delay any such person, and such transfer is made *gratuitously* or for a grossly *inadequate consideration*, the transfer may be presumed to have been made with such intent as aforesaid.

Proviso: Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

The whole section has been recast making it more sensible than before and ridding it of all its meaningless superfluities. The first paragraph of the old sec. 53 consisted of two parts: The *first* part related to transfers made with intent to defraud (i) prior or subsequent transferees, and (ii) co-owners or other persons having an interest in the property. As transfers take effect according to priority of time (see at p. 116), it is inconceivable how a transfer can be made with intent to defraud a *prior* transferee. So, the word "prior" has been altogether deleted. It is also difficult to conceive of any case in which a co-owner or other person having an interest in the property could be defeated by the transfer effected by the transferor. These words also do not find any place in the English Statutes from which the section was copied. So the words relating to "co-owner or other person interested" also have been deleted. What remains after such deletion has now been reproduced in sub-sec. (2) of the section. The *second* part of the first paragraph of the old section related to transfers made with intent to defeat or delay the creditors of the transferor. This has been re-enacted in sub-sec. (1) of the present section. The above two rules represented by the two parts of the first paragraph of the old section were taken from two different English Statutes and were amalgamated together and it was provided that an intention to defraud, defeat or delay, as the case might be, would be presumed from the mere fact that the transfer com-

plained of was without consideration (gratuitous) or was for a grossly inadequate consideration. This presumption was dealt with in the second paragraph of the old section. In the course of decisions on cases arising under the old sec. 53 as well as under the corresponding English Statutes it was discovered that the question of intention to defeat, delay or defraud etc. could not be approached in the same manner with respect to the two rules aforesaid; and it was also discovered that the rule of presumptive intention was not proper. Therefore, the two rules in the two parts of the first paragraph of the section have been taken asunder and treated separately in the two sub-sections (1) & (2) of the present section, and the second paragraph of the old section dealing with the rule of presumption (as to the question of intention) has been omitted. So, now whether a transfer has been made with intent to defeat or delay creditors has to be actually ascertained from the facts of the case. That is, an *actual* intention has to be established from the evidence in the case. In sub-sec. (2) of the present section it is distinctly laid down that *for the purpose of* that sub-section, no transfer made without consideration shall be deemed to have been made with intention to defraud by reason only that a subsequent transfer for consideration was made. This means that the mere fact that a transfer is gratuitous and is followed by another transfer for consideration will not raise a presumption of fraudulent intention. Therefore, so far as the second sub-section is con-

cerned it must be established by positive proof that there was an intention to defraud the subsequent transferee. It should be noticed that a similar provision has not been made with respect to the first sub-section. So, under that sub-section it will be competent for a Court to draw an inference from the absence of consideration that the transferor intended to defeat or delay the creditors.

A transfer to defeat or delay creditors is not *ipso facto* void, but is simply voidable at the instance of the creditors prejudiced by it, and if such creditors do not challenge the transaction, it stands. A transfer of *immoveable* property can be avoided under sub-section (1) only when it is made with the clear intention of defeating or delaying the creditors. So when the element of this *evil intention* is absent the transfer will be valid. Such evil intention has to be established by actual evidence, though the Court will be justified in inferring such evil intention from the fact that the transfer is gratuitous. The second paragraph of sub-sec. (1) contains an important proviso. It says that the rights of a *bona fide* transferee for value will not be affected by the doctrine propounded in sub-sec. (1). Mere payment of *good* or *valuable* consideration alone will not protect the transferee. Added to consideration there must be good faith on his part. If the transferee is privy to the transferor's intention to defeat or delay his creditors, he will have no protection (11 C. W. N. 889). But if he acts in good faith, an evil inten-

"In order to establish the validity of a conveyance impeached as fraudulent on creditors, it is not enough to prove that it was for consideration; it must also be proved that it was made in good faith." Explain with reference to the leading case on the subject. B. L. (Int.) 1927 (July).

State briefly the law about fraudulent transfers and give the substance of the case of *Ishan Chandra* v. *Bishu Sardar*, B. L. 1909 1917 (Jan.) 1921 (July) 1922 (Jan.) 1924 (Jan.)

tion on the part of the transferor will be immaterial, and will not invalidate the transfer. The fact that there were some suspicious circumstances connected with the transfer will not affect him unless it is shown that he has participated in the transferor's *mala fides*. If the transferee's bad faith be once established, the question of consideration will not at all be gone into. See Exs, 6, 7 and 8, below. See also *Ishan Chandra* v. *Bishu Sardar*, 24 Cal., 815=1 C. W. N. 665, wherein it has been held that mere knowledge of an execution proceeding of the creditor does not make the transfer *mala fide*; while on the other hand mere payment of consideration does not raise a presumtion of *bona fides*. "Consideration" means valuable or adequate consideration and inadequacy of consideration may lead to a conclusion of evil intention. The section does not apply when the so-called fraudulent transferee is a creditor

The benefit of the section is not restricted to *existing* creditors. An intention to defeat or delay a *future* creditor may vitiate a transfer. So, a transfer effected with the object of concealing one's property in order that it might be possible to incur debts without running any risk of losing property, is open to attack under this section. But a settlement in favour of the wife in order to save the property from the donor's own extravagance will not be voidable at the instance of the creditors from whom the donor *subsequently* borrows money, *vide* Ex. 12 at p. 147.

Sec. 53 however, does not render the transaction altogether *void*, but makes it only *voidable* at the option of the creditors (whether past or future) who are defeated, or delayed (23 C. L. J., 570) or at the option of the *future* transferees. Only the persons prejudiced, and no others, can take exception to a transfer under this section. The transfer being simply voidable stands until avoided. **Who can object.**

With reference to sub-sec. (2), it should be noted that only a *future* transferee can get the transfer avoided, whereas under sub-sec. (1) both the *past* and *future* creditors can do so. Under this sub-section only a *gratuitous* transfer is open to attack. Under sub-section (2) mere payment of consideration apart from the question of the transferee's good faith will validate the transaction, but under sub-sec. (1) mere consideration unbacked by good faith is not sufficient, *vide* pp. 135-36, *ante*.

The section invalidates only a transfer which removes the whole or part of the debtor's property from the creditors as a body for the ultimate benefit of the debtor himself. The security given by a debtor to one creditor upon the property is not within the mischief of the section.*

N. B. The following circumstances may lead to an inference of want of *good faith* on the part of the transferee : (i) transfer of the entire estate : (ii) transferor remaining in possession after transfer ; (iii) transfer being effected secretly or in anticipation of litigation ; (iv) deed being ante-dated ;

* *Solema Bibi* v. *Hafez.* 54 Cal. 687.

(v) want of registration ; (vi) insufficient reason for transfer ; (vii) absence of independent witnesses ; (viii) transfer in favour of near relations etc.

Would preference to any particular creditor be *ipso facto* fraudulent within the meaning of the rule? B. L. Int. 1922 (Jan.).

*** *Preferential Transfer to a Creditor :* Under the statutes of Bankruptcy when a debtor makes a transfer of his property in favour of a creditor for the purpose of giving such creditor a preference over the other creditors, his transfer is deemed fraudulent as against the trustee in bankruptcy. The object of a Bankruptcy Act, so far as the creditors are concerned, is to secure equality of distribution of the property of the bankrupt among them. But under Sec. 53 of the T. P. Act, the object of which is quite different, there is nothing to prevent a debtor from paying his debts in any order he pleases, and consequently from preferring the creditor of his choice.* Apart from considerations of bankruptcy law, a debtor may make preferenee amongst his creditors, even to the extent of transferring all his property to one creditor to the exclusion of the others ; and such a preferential transfer cannot be declared fraudulent even though the debtor, in making it, intended to defeat the other creditors and though the favoured creditor had knowledge of such intention ; 6. C. L. J, 410 (425) ; (also read the quotation from *Lockren* v. *Rustan* in Q. 5, *infra*). The law on this subject has been settled by the Privy Council in *Musahar* v. *Hakimlal*, 23 C. L. J., 406, in which their Lordships have thus observed :

Discuss the rule as to validity of a conveyance

* *Mina Kumari* v. *Bejoy*, 44 Cal., 662 (P. C.) s. c. 25 C. L.J. 508.

"In a case in which no consideration of the law of Bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The transfer which defeats or delays creditors is not an instrument which prefers *one creditor* to another, but an instrument which removes property from the creditors *to the benefit of the debtor.* The debtor must not retain a benefit for himself. He may pay one creditor and leave others unpaid." Read *Ma Pwa May* v. *Chettyar Firm*, 56 I. A. 379=34 C. W. N. 6=51 C. L. J. 6, P. C. The distinction between an outsider-transferee and a creditor-transferee is this that an outsider can well afford to keep out of the transaction, but a creditor, who has already a stake in the matter, is compelled to resort to the transaction for his own safety. That is why the law is so lenient towards the creditor-transferee but not to a stranger transferee.

impeached as a fraud upon creditors as laid down in *Hakim Lal* v. *Mooshahar.* B. L. (Int.) 1923 (July) 1924 (Jan.).

N B. Preferential transfer to a creditor furnishes an exception to the rule regarding avoidance of fraudulent transfers enacted in this section.

Provisions of Bankruptcy Law not affected by this section: The second proviso to sub-section (1) lays down that that sub-section will not affect any law for the time being in force relating to insolvency. The effect of this saving provision is that a voluntary transfer, though it may be perfectly good under this section, may be avoided in insolvency proceedings [under the cir-

cumstances mentioned in sec. 55 of the Presidency-towns Insolvency Act, 1909, or sec. 53 of the Provincial Insolvency Act, 1920]. Similarly, a transfer is not necessarily invalid under sub-section (1) hereof because it amounts to an assignment of all the transferor's property for the benefit of a particular *creditor*, *Alton* v. *Harrison*, (1869) L. R. 4 Ch. 622 (626), but it may operate as an act of insolvency under the Insolvency Acts, or it may be void as amounting to a fraudulent preference within the meaning of sec. 56 of the Presidency-towns Insolvency Act or sec. 54 of the Provincial Insolvency Act, see *Ma Pwa May* v. *Chettyar Firm*, 56 I. A. 379=34 C. W. N. 6=51 C. L. J., 6, P. C. Thus, a transaction may be impeachable under the Bankruptcy Law, while it is quite valid under this section, and the effect of this saving proviso is not to protect a transaction when the same is attacked in an Insolvency Court.

What remedy has a creditor to have a transfer declared fraudulent? B. L. (Int.) 1914 (July).

How far can a transfer of property by an owner be avoided by his creditors? All. 1923.

Remedy of a defeated Creditor : We have seen that a transfer to defeat or delay a creditor is *voidable* at the option of the creditor so defeated or delayed. It is voidable only and not void. So, it has to be avoided. In order to avoid it a regular declaratory suit is necessary and ordinarily all the creditors in whose defeasance the transfer is made should join in the suit, 11 C. W. N. 889. Even if all the creditors do not join in the suit and the suit is instituted by one or some of the creditors only, it will be regarded as a representative one, that is, as instituted on behalf of, or for the benefit of, all the creditors. So, if all the creditors are not known and are therefore not impleaded in the suit, the suit will not fail, 26 Bom., 557 and the decree when obtained will enure for the benefit of the absent creditors as well. Formerly, there was a conflict of judicial opinion

regarding this matter. The trend of decisions of most of the High Courts was that the suit was a representative one and one of the creditors might sue on behalf of the general body of creditors, 34 Cal 999; 16 Bom. 1; 27 Bom. 146 and 322. The Madras High Court took a different view, 42 Mad. 143. The Legislature has now given effect to the majority opinion. Therefore, a single creditor cannot institute a suit to avoid a transfer on his *own* account only. The portion within brackets, *viz.*, "which term includes a decree-holder whether he has or has not applied for execution of his decree" makes it clear that a decree-holder is a *creditor* within the meaning of this section and overrules the contrary view maintained by the Madras High Court. It is open to an attaching decree-holder to plead in defence to a suit by the alienee from the judgment-debtor whose claim case has been rejected, that the transfer to the alienee is voidable under this section, without himself filing a suit hereunder to avoid the transfer, 43 Mad. 760 (F. B.).

Ex. A sells a property to B for consideration. But prior to that he made a gift of that property C soley with the object of helping C and not for entrapping B. (i) Can B avoid the transfer? (ii) Will it make any difference if the prior gift to C was made with intent to defeat B, the subsequent transferee? **Ans.** :—(i) The gift to C prevails, there being no evil intention; (ii) the intention to cheat B, the subsequent transferee for consideration, vitiates the gift to C and renders the same voidable at his (B's) instance.

Effect of fraudulent transfer as between the parties to the fraud: Broadly speaking, fraudulent transfers are mostly sham transactions unsupported by consideration and after a certain time the parties thereto (*i.e.* the transferors and transferees) themselves quarrel for restoring things to their original condition. If the transferor succeeds in cheating his creditors by the fraudulent transfer and then seeks to recover the property from the transferee alleging that the transfer was fictitious, the Court will not assist him. But where the attempted fraud was not carried into effect, that is, the

creditors were not cheated (*i.e.* not delayed or defeated), the Court will not punish the transferor for his inchoate fraud but render him all assistance in recovering back his property from the transferee. See Q. 17, below.

B. L., 1910 (Jan.) Q. 1. B, a debtor, sells all his properties, to A, one of his creditors, for the debt due to A, the properties sold not being worth materially more than this debt. The debtor B intended by this sale to defeat the claims of his other creditors, and the favoured creditor A, being well aware of this fraudulent intention of the debtor, purchased the properties as above ; (*a*) Is the purchase by A liable to be set aside by the other creditors ? (*b*) Would it make any difference if the purchaser had been a third party, the other facts being identical ?—*Ans.* : (*a*) No. (*b*) Yes : See 6 C. L. J., 410, and Q. 5, below.

Q. 2. A was indebted to B, his sister. Some time after, he created a mortgage on his property in favour of B, keeping to himself with B's consent all the deeds connected therewith so that he might deal with the property at pleasure. The property was afterwards mortgaged to a third party—*held,* the first transfer (to B), though for consideration and therefore not within the mischief of sub-sec. (2) of the section, was void as having been made in fraud of the *subsequent* mortgagee. (*Perry Herrick* v. *Attwood,* 27 L. J. Ch. 121). A similar view has been taken in *Nandalal* v. *Abdul,* 43 Cal., 1052.

Q. 3. A transferred his property to B by way of paying of his debt to him which is time-barred. A subsequent transferee of the same property sought to avoid the transfer to B under this section ; *held,* barred debts cannot form any consideration for a transfer as against a creditor, (11 Bom., 66).

Twyne's case. Q. 4. A debtor transferred to a creditor the whole of his property while there was a suit of attachment pending against him. Besides, the whole transfer was made secretly and notwithstanding the transfer the debtor was in possession.

All these facts combined led to an inference that the whole transaction was collusive and that the apparent sale was no transfer at all, and that it was in the nature of a trust and as such the purchaser was not in good faith within the meaning of the section : (*Twyne's* case, Smith L. C. 1.)

Q. 5. A has three creditors B, C and D. B and C obtain decrees against A to D's knowledge ; D then obtains a transfer of the entire property of A in satisfaction of his own debt. Is the transfer voidable at the instance of B and C ?—B. L., 1910 (July) ; All. 1925 (Ext.)—No ; "A creditor who takes the property of his debtor in satisfaction of a pre-existing indebtedness is in a different circumstance from that of a purchaser for a present consideration, who is in every sense a volunteer. The law throws upon him no duty of protecting the other creditors. He has the same right to accept a voluntary preference that he has to obtain a preference by superior diligence ; he may know the fraudulent purpose of the grantor but the law sees that he has a purpose of his own to serve, and if he goes no further than is necessary to serve that purpose the law will not charge him with fraud by reason of such knowledge," *Lockren* v. *Rustan*, (1899) 9 North Dakota, 43 (48) ; see also *Musahar's* case, 23 C. L. J., 406.

B. L., 1910 (July).

Q. 6. A, a transferee for value of a property is not aware of any intention on the part of the transferor to defeat or delay his creditors, but has knowledge only of an impending execution against the transferor, *held*, that mere knowledge of an impending execution against a transferor is not sufficient to make the transferee other than in good faith when he does not share the intention of the transferor to defeat or delay his creditors. *N.B.*—The question of good faith is a question of fact. See *Ishan Chandra* v. *Bishu Sardar*, 24 Cal., 825, S. C. 1 C. W. N., 665.

Discuss the proviso as to the right of a transferee in good faith and for consideration in the light of the principles laid down in *Ishan Ch.* v. *Bishu Sardar*, 24 Cal., 825.

Q. 7. A sells a property to B with the intent of defrauding a creditor who has got a decree against him. B has knowledge of the decree, but not of A's intention : (*a*) Is B's

B. L. 1911 (July). 1915 (Jan.)

purchase voidable at the option of the creditor? (*b*) Would it make any difference, if B were aware of such intention? (*c*) If B was one of the creditors and A transferred all his property to him in satisfaction of his debt, would the transaction be voidable at the instance of the other creditors? (B. L., Int, 1915, Jan.)—(*a*) B's knowledge does not make his conduct *mala fide*: See Q. 6: (*b*) B's knowledge of the fraudulent intention vitiates the transfer: (*c*) The position of a creditor is different from an ordinary transferee; hence the transaction is not voidable; see Q. 5.

B. L., 1911 (Jan.)

Q. 8. A, a person in involved circumstances wants to convert the only immoveable property he has got into money which he intends to conceal from his creditors. B, a friend of A, knowing of A's intentions and desiring to assist him, purchases the property from him, paying its full value. A conceals the money, and his creditors are unable to recover the debts due to them. What rights, if any, have the creditors in respect of the property purchased by B from A? Give reasons (B. L. 1911), Jan.)—As B participates in the fraud of A, he cannot be said to have acted in good faith even though he paid full consideration; so the creditors will have the right to avoid the transfer.

B. L., 1912 (July).

Q. 9 A Mahomedan, becoming heavily indebted, trans-fers his property to his wife in part satisfaction of the dower due to her. The consideration is inadequate, but the lady has no knowledge of her husband's liabilities. Can his other creditors avoid the transfer?—"If there was a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the share in satisfaction of it the transaction was a perfectly legitimate one and no Court has any power to disturb it," (*Suba Bibi* v. *Balgobind*, 8. All., 178). It should be noticed that the lady is in good faith within the meaning of the first *proviso* to sub-sec. (1).

10. A owes money to B. Pending the suit by B to recover his debt, A sells his entire property to his wife in lieu of

the vendee's deferred dower debt. B then obtains a simple money decree and attaches the property transferred. Is the sale in favour of the wife voidable at the instance of B? [All. 1922, 1926 (Ext.)]—*Ans.* No, see Q. 9.

11. Several decrees for money have been passed against A, who expects that one or more of the decree-holders will apply for execution B is a friend of A, and is a simple contract creditor of A for Rs. 2,000. In order that B may not lose anything A sells his only property (a house) to B for Rs. 2,000 and sets off the price against the debt. Rs, 2,000 is a fair value for the house. B. L. (Int.) 1926 (July).

Can this transaction be set aside under sec. 53 of the T. P. Act.? Give reasons for your answer, and refer to any decisions on the point that are known to you.—1926 (July):—*Ans.* Cannot be set aside, see Qq. 5 & 9.

Q. 12. A, a man of extravagant habits, made settlement of his entire property on his wife. At the time of his settlement A was not in debt but he subsequently contracted a debt: *held*, the subsequent creditors cannot avoid the settlement as it is clear that it was made not to save the property from the creditors but from the settlor himself (*Sada Shiv* v. *Trimbak*, 23 Bom., 146).

Q. 13. Is a voluntary gift voidable at the suit of the creditors merely because the transferor was involved in debts at the time?—No, "If it were so, few persons and none engaged in commercial business could make valid gifts" (Shephard and Brown). The gift is not made with intent to defeat or delay creditors, and is therefore not within the mischief of sec. 53.

Q. 14. With the intention of defeating his creditors, A sold his only property to B, who knew of A's intention, but paid the full value of the property; can the creditors proceed against the property in B's hands? (Mad. 1907)—Yes, see Qs. 1 (*b*) and 8, above.

Q. 15. A in order to defraud his creditors (i) gives certain

property to his wife, (ii) sells other property to his brother at a very low price, and (iii) sells the rest of his property to a stranger at a fair price. If A's creditor sued to set aside these transactions, to what extent, if at all, would they have to prove that the transferees were at the time of the transfers aware of A's fraudulent intention? Give your reasons (All. 1924)—*Ans* : (1) The transfer to wife is gratuitous, and as the transfer is in fraud of creditors, the latter can avoid it : (ii) The sale to brother is for consideration (although inadequate) and cannot be avoided by the creditors unless it is *mala fide* : (iii) The creditors must show that the stranger-transferee participated in the fraud of the transferor, otherwise, he will get protection under the proviso to sec. 53.

Q 16. **Chidambaram v. Srinivasa**, 37 Mad., 257 (P. C.) (s. c. 20 C. L. J., 571) affirming 30 Mad. 6 : S, a debtor, was in a state of insolvency. By a deed of assignment, he conveyed his property in favour of A. The effect of the deed was that he was left without any means to pay off his debt due at the time of the assignment : *held* (1) such an assignment is void against his creditors ; (2) the deed can be valid only if it is proved that the assignment is made *bona fide* and for good consideration ; (3) if the deed be partly for consideration and partly to defeat creditors, it is wholly inoperative against the creditors and cannot be upheld to the extent to which it is supported by consideration : (N. B.—the above case has been given in a modified form).

Q. 17. *A*, in order to avoid certain creditors who obtained decrees against him, executed a deed, of relinquishment in favour of *B*, alleging that the property belonged to the latter. The decrees were ultimately set aside on appeal. In the meantime *B* transferred 8 as. share of the property to *C*. *A* then sued *B* and *C* to recover possession of the property on declaration that the deed of relinquishment was a fictitious document which conveyed no title

to *B*, and consequently *C* also acquired no interest in it. It was found that *C* was not a *bona fide* purchaser for value without notice, The High Court held that *A* was entitled to succeed. Justify or controvert: B. L. (Int.), 1918 (Jan.).

Ans. The above facts are taken from **Jadunath Poddar v. Rup Lal Poddar**, 33 Cal., 967=4 C. L. J. 22.

Discuss the rule about *benami* fraudulent transfer as laid down in *Jadu nath* v. *Rup Lal* and *Petherpermal* v. *Muniandy.* B. L. (Int.) 1923 (July). 1926 (Jan.)

The two chief points decided in this case are :—(*i*) Where the intended fraud has not been carried into effect, the Court will not punish the person with the fraudulent intention ; (*ii*) Title to land cannot pass by admission when the Statute requires a deed, and the mere execution of a deed of release does not create any title in the person in whose favour the deed is executed. [N. B. Along with this read the following cases, 36 C. L. J. 82 and 39 All., 51 and 58]

Q. 18. **Petherpermal Chetty v. Muniandy**, 35 Cal., 551=7 C. L. J. 528 (P. C) : In order to defeat the claim of an equitable mortgagee of a certain property, S executed a *benami* sale deed in respect of the same in favour of C, but, the mortgagee subsequently got a decree and his claim was ambicably paid off. Afterwards, S brought a suit for a declaration that the sale in favour of C was a mere *benami* transaction. The Court gave him the relief on the ground that as the purpose of the sale was not carried into effect S was entitled to repudiate the transaction as *benami* and recover possession of the property.

Q. 19. Answer on reference to leading cases (*a*) if a transfer of immoveable property for value to a person who has knowledge of an impending execution against the transferor, and (*b*) a transfer to one of several creditors of the entire immoveable property of the debtor, are voidable as being transfers to defeat or delay creditors within the meaning of S. 53 of the T. P. Act.—Cal. 1929 (July).—See Qq. 6 & 5.

Part performance.

Sec. 53A. Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms neccessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken, or continued in, possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the right of a transferee for consideration who has no notice of the contract or of the part performance thereof.

What is meant by the doctrine

Doctrine of Part Performance : The section is altogether new and gives statutory re-

of part performance Under what circumstances can a transferee under an informal transfer claim the benefit of the doctrine of part performance under the present law? B. L. (Int.) 1931 (Jan.)

cognition to what has hitherto been regarded as the Doctrine of Part Performance. It sometimes happens that a parol agreement relating to land has partly been performed by one party and yet by reason of some such technical defect as want of the necessary registered document, such party cannot compel the other party to perform his part of the contract. Where one party has executed his part of the agreement in the confidence that the other party would do the same, it would be a fraud upon the former to suffer this refusal to work to his prejudice. To prevent a fraud of this description the doctrine of part performance was enunciated by the judges on the basis of the rules of Equity. Now this doctrine has received a statutory recognition here. For the leading case on the doctrine of part performance, read *Mahomed Musa* v. *Aghore Kumar Ganguli*, 42 I. A. 1 : 42 Cal. 801 : 19 C. W N. 250 (P. C). The section lays down that where a person *contracts to transfer* an immoveable property for *consideration* and the contract is effected by means of a written instrument which the contractor himself signs or which is signed on his behalf and if from the contract the terms necessary to constitute the transfer can be ascertained with reasonable certainty and if the transferee has, in part performance of the contract, taken possession of the whole or a part of the property and where he was already in possession, has maintained his possession and done something to show that he is acting upon the contract and further if the transferee has carried out all his obligations or declared his willingness to carry

if the transferee can perfect his title by 12 years' adverse psssession, that will make him safe. A person claiming under or through the transferor is also under a like disability in the matter of derogating from the contract ; but a subsequent transferee from him for value without notice will not be hit by the rule of this section ; but now, under sec. 3, actual possession being regarded as tantamount to notice it will not ordinarily be possible for a subsequent transferee to plead absence of notice in cases where the contractee, *i.e.* the previous transferee, is in *actual* possession of the property.

Parol agreement : The benefit of this section does not extend to *parol* agreements ; we have seen that the contract of transfer must be in writing This provision has been enacted to avoid perjured evidence which is likely to centre round an oral agreement.

Previous Possession : Where possession is taken in part performance of the contract, that fact along with the writing is sufficient to attribute the possession to the agreement. But where the transferee is already in possession, in order to attract the operation of the doctrine it is necessary that the transferee should not only maintain his existing possession, but should also do some specific act in furtherance of the contract. Such acts may be payment of rent according to the terms of the contract or the act of spending some money over the property either in accordance with

the terms of the contract or in a manner indicative of exercise of the rights under the contract.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

Sec. 54 (i) : **Sale** is a *transfer* of ownership in exchange for a price paid or promised or part-paid and part-promised.

How is a sale defined in the T. P. Act ?

(ii) Such transfer, in the case of *tangible immoveable property* of the value of one hundred rupees and upwards, can be made only by a registered instrument.

How is a sale of tangible immoveable property made ? B. L. 1912 (July) 1915, 1916 (July), 1920 (Jan.) 1928 (July). 1930 (Jan.) 1931 (Jan.) 1931 (July). Bom. (1916).

Sale of a reversion or other *intangible* thing should also always be made by a registered instrument.

(iii) In the case of immoveable property of a value less than Rs. 100 such transfer may be made either (1) by registered instrument or, (2) by delivery of the property.

How is a sale effected ? B. L. 1911 (July). 1928 (July).

N. B —A sale may take place in respect of the ownership of a limited or smaller interest.

Meaning of Delivery :—Delivery of a tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property ; or in other words, it is an act which has the effect of putting the buyer in possession of the property (see Sec. 90 of the Contract Act).

N. B.—By possession we do not mean "actual physical possession"; if it were so, sale of properties by delivery of possession would, in most cases, become impossible; because in great majority of cases, the properties are in the occupation of other people, such as tenants and lessees. Where *actual* possession cannot be delivered *constructive* possession will do. Thus, delivery of the title deeds was held to be sufficient when the land sold was in the possession of tenants. In short, delivery of possession may be said to have been effected "when the owner of the property places the buyer in such relation to the land and its actual occupants as he himself occupies."

What are the elements of a valid sale? All. 1926 (*Ext.*)

Elements of a valid sale :—(1) A sale is essentially, though not always, a contract, ; therefore (*a*) there should be parties competent to contract, and (*b*) mutual assent ; (2) there must be a transfer of 'ownership' ; (3) the transfer is from the seller to the buyer ; (4) the transfer is in exchange for a price ; (5) the price must be *paid* or *promised*, or *part* paid and *part* promised ; (6) Price must be only money and not things ; (7) In the case of (*a*) tangible immoveable property above Rs. 100, (*b*) reversion and (*c*) intangible properties there must be a registered instrument : (8) In the case of tangible immoveable property below Rs. 100 there must be *delivery* of possession or in lieu thereof a registered instrument.

Sale, mortgage and lease compared : These are all different forms of transfer, A sale transfers the *entire ownership* in the property. A mortgage transfers only *some* interests in the property. A lease transfers only the right of *enjoying* the property. Cf. secs. 54, 58 and 105. N. B : A sale requires no attestation, but a mortgage does.

Distinguish between *Sale* and *Exchange*. B. L. 1911 (Jan.).

Distinction between sale and Exchange :—A sale is a transfer of ownership for a *price*. An exchange also implies a transfer of ownership—but not for a price ; in an exchange the ownership of one thing is transferred for the

ownership of another thing, neither thing being money. In a sale the *price* is always money. If we substitute *thing* for *money*, a sale will become an "exchange."

Distinction between tangible and intangible property : The difference between these two kinds of properties is the same as that between corporeal and incorporeal hereditaments of the English Law of Real Property. The students of Real Property will easily remember the phrases, "*lie in grant*" and "*lie in livery*," and will fully grasp the true import of the maxim, "incorporeal hereditaments lie in grant and not in livery." Delivery of possession (*i. e. livery*) being impossible in the case of intangible property the only mode of conveyance prescribed for this kind of property is a registered instrument, irrespective of its value.

Sale below Rs. 100 : We have seen that as regards intangible property the T. P. Act prescribes the uniform rule that, irrespective of its value, it can be sold only by a registered instrument ; but as regards tangible immoveable property where its value exceeds Rs. 100 registration is compulsory for its sale ; but where the value of such tangible property is less than Rs. 100 a sale can be effected by any of two alternative modes, namely (i) delivery of possession, or, (ii) a registered instrument. If delivery of possession be possible no registered instrument is necessary for a sale of *tangible immoveable* property below Rs. 100. But where possession, actual or constructive, is not delivered * or where delivery of possession is impracticable, the sale must be made by a registered

* *Brajaballav* v. *Akhoy*, 30 C. W. N. 254.

instrument. Thus, in a case* of a sale of property below Rs. 100, where possession was already with the buyer it was *held* that the delivery being out of the question, the sale was not valid without a registered instrument. In cases of transfers by delivery of possession the delivery is the essence of the transaction, because it establishes the change of possession. Consequently, where delivery is not possible (as in *Shibendra's* case) there ought to be a registered instrument. We, however, here repeat that actual delivery is not always indispensable as constructive delivery may do. Thus, in 22 Cal., 179, it has been maintained that it is not necessary that there should be any formal making over of possession; if on the date of the sale the vendee gets into possession with the assent, express or implied, of the vendor there will be a constructive delivery of possession; also see pp. 155-56. See however the Madras High Court view in 28 L. W. 234, *infra.* Though under sec. 53 A, a contract of sale coupled with delivery of possession entitles the intending vendee to maintain his possession as against the vendor, still that does not complete the sale and confers no *title* on the vendee.

A plot of land is sold for Rs. 50 by an unregistered deed. The buyer had already been in possession of the land as a lessee. Discuss the validity of the transaction. B. L. (Int.) 1921 (July. 1925 (Jan.) 1924 (July).

T. P. Act v. Registration Act: Under the Registration Act sale of property for a value less than Rs. 100 by unregistered instrument *without* delivery of possession is valid but this rule of the Registration Act has been altered by the T. P. Act. Under the Ind. Registration Act if a vendor

When is an instrument for the sale of land optionally registrable

* *Shibendra* v. *Secretary of State*, 34 Cal. 207 = 5 C. L. J. 390. Cf. 23 C. W. N. 513.

intends to sell his land (being below Rs. 100) he need not make over his possession to the purchaser, nor is he required to have his sale-deed registered, as the unregistered instrument alone will complete the sale. But the effect of such an unregistered instrument under the T. P. Act is nothing; because standing by itself, such an instrument confers no title unless accompanied by delivery of possession. Again delivery being made over, the sale becomes complete, and we need not see if there is any instrument of conveyance at all, as then such an instrument becomes superfluous, though it may have some evidentiary value by reason of Sec. 91 of the Evidence Act which excludes oral evidence in case of written contracts, *Sheikh Juman* v. *Mhd. Nabineoas*, 21 C. W. N. 1140.* The Madras High Court has thus reasoned in *Kuppu Swami* v. *Chinnaswami* 28 L. W. 234=111 I. C. 677 —If in a transaction regarding property below Rs. 100 there is a registered deed *plus* delivery of possession, you cannot call it a sale by delivery of possesion and therefore you are bound to look to the deed which being unregistered the sale is invalid. This logic is faulty, because the deed places the vendee in a worse position and invalidates the sale which would otherwise be valid by reason of delivery of possession, the property being worth less than Rs. 100. The presence of the deed may exclude oral evidence regarding the contract (sec. 91, Evidence Act) but certainly does not exclude evidence of possession; nor does it detract from the legal consequence of the delivery of possession. If there be no delivery, the instrument must be registered notwithstanding any provision in the Ind. Reg. Act to the contrary. Section 4 of the T. P. Act (see p. 23) provides that section 54, paras *ii* and *iii*, shall be read as supplemental to the I. R. Act. The effect of that provision is to make S. 54 absolute and irrespective of the Registration Act; or, in other words, S. 54 virtually abolishes optional registration under the I. R. Act in respect of

under the land. Registration Act? B L. 1911 (Jan.) 1919 (Jan.)

Is there any difference bet. the provisions of the I. R. Act and those of the T. P. Act in this respect? 1919 (Jan.).

* Read the article, published in 22 C. W. N. at p. vii.

a sale of property below Rs. 100, *Makhan* v. *Banka Behari*, 19 Cal., 623, F. B. The effect of non-registration, whether in violation of sec. 17 of the I. R. Act or of the provisions of this Act is that the document cannot be admitted in evidence to affect immovable property.

Ex. 1. A grants a lease of an undivided 4-anna share of a tank (the value whereof is 50 rupees) to one who is the owner of the remaining 12-anna share, and subsequently during the subsistence of the lease, sells the 4-anna share to B by an unregistered deed of sale. Is the sale valid. under the T. P. Act and the Ind. Reg. Act respectively? State reasons. B. L. (Int), 1913 (July)—*Ans*: Under the Registration Act the value of the property being below Rs. 100, the unregistered deed alone (though unaccompanied by delivery of possession) perfects the sale. But under the T. P. Act (which supplements the Registration Act), the property being in the possession of B as lessee delivery is not practicable, and therefore registration is compulsory: See *Shibendra* v. *Secretary of State*, p. 158.

Ex. 2. A plot of land is sold for Rs. 50 by an unregistered deed. The purchaser *has already been in possession* of the land as a lessee. Discuss the validity of the transaction, (B. L. 1923, Jan.; 1924, July; 1925, Jan.)—*Ans.* As delivery of possession is out of the question in this case, the unregistered deed passes no title; the deed should have been registered, *vide ante*.

Ex. 3. A property sold was of a value less than Rs. 100 and the sale deed was not registered. The sale however was completed by delivery of possession. A suit was then brought by the vendor against the purchaser to recover possession of the property on the ground that the transaction was a usufractuary mortgage and not a sale. Was the sale-deed admissible in evidence to show that the defendant was in possession not as a mortgage, but as a purchaser? Discuss, (Cal. 1929, Jan.) *Ans*: The sale being completed by delivery of possession, the deed was not compulsorily

registrable and therefore its non-registration will not render it inadmissible.

Competition between Possession and Registration : In cases of sale of immoveable properties below Rs. 100, the T. P. Act provides two distinct modes for completing the transaction, *viz.*, (i) a registered instrument, and (ii) delivery of the property. Consequently, if the sale be completed by any of these modes, a subsequent conveyance of the same property in favour of a third person by a registered instrument cannot prevail, When both the instruments are registered there arises no question of any competition; but when the previous sale takes place by delivery of possession and the subsequent one by registration, the question is if there is any competition between the two in view of the provisions (secs. 18, 48 and 50) of the Registration Act. We have noticed that under sec. 18 of the I.R. Act an unregistered deed alone (without delivery of possession) can perfect a sale when the value of the property is less than Rs. 100. But this provision has now been modified by sec. 54 of the T. P. Act which has virtually abolished optional registration (see p. 159. *ante* and 19 Cal. 623, F. B.). If the sale-deed be not registered delivery of possession is compulsory ; and if delivery of possession be given the subsequent registered instrument cannot have any priority over it, (sec. 48 of I. R. Act). Besides, the sale being complete by delivery of possession, the vendor's capacity for transfer is exhausted and therefore he cannot pass any valid title to the subsequent trans-

feree (even with registration). There is an additional reason for postponing the claim of the subsequent transferee. The first transfer being accompanied by delivery of possession, such possession operates as notice to the subsequent transferee. In case of properties worth Rs. 100 or more, registration is always compulsory. So if the first sale is effected by delivery of possession only and the second by registration, the first vendee though his title is not perfect will however get protection against the subsequent registered vendee, because his possession will operate as notice to the latter. [see sec. 53 A.]

What is the effect of a registered document as against an unregistered document relating to immoveable property of the value of Rs. 50 followed by delivery of possession under the I. R. Act? B. L. (Int.) 1913 (Jan.)

Under S. 50 of I R. Act a subsequent registered deed has priority over a previous unregistered deed. So if the Registration Act stands by itself, an unregistered instrument (not accompanied by possession) will be postponed in favour of a subsequent registered instrument. Therefore, under this Act, a competition between possession and registration is possible. In the earlier cases a good deal of legal discussion was spent over this question and the apparent conflict between sections 48 and 50 was often brought to bear upon it. Under sec. 48 a subsequent registered document cannot take effect against an oral agreement followed by delivery of possession. Under S. 50, a registered document will have priority over a previous unregistered document (with or without possession). So unless we can reconcile S. 48 with S. 50, the result will be that a transaction resting on document which is optionally registrable and which is accompanied by possession is liable to be superseded by a registered instrument, while an oral agreement with possession is safe; or in other words, it is safer to depend on an oral agreement with possession than on a *written* agreement without possession. This anomalous position was sought to be explained away in the F. B. decision of the Madras High Court in 16 Mad.,

State how in a case in which a transfer of property can

149, F. B. by the doctrines of notice and possession. It has been maintained in that case that S. 50 is subservient to the equitable doctrine of notice, and that possession is notice. Consequently, previous possession would, in most cases, taint the subsequent registered transfer with notice and would thereby exclude the operation of S. 50. In an early Calcutta case (10 Cal., 1075) Garth C. J. has maintained that possession of the previous transferee necessitates the subsequent transferee's personal examination of the land; if he neglects to do so he runs the risk of losing his money. It may be sufficient for our purpose to re-iterate that the aforesaid competition can arise only under the I. R Act standing by itself. But under the T. P. Act the sale is complete as soon as delivery is given and then there can be no competition between possession and registration. According to some opinion an equitable mortgage is within the mischief of S. 50; but we are apt to think that such a mortgage being a complete transaction is not subject to the rule of priority enunciated in S. 50.

be effected without a registered document, a transfer under registered document operates against a prior transfer without such a document. B. L. (Int.) 1916 (July.)

Would a document, which is not compulsorily registrable but which has beon registered, have precedence over an unregistered document relating to the same property? B. L. (Int.) 1930 (July).

Ex. 1. A sells to B a plot of land for Rs. 90 by delivery of possession; subsequently A sells the same plot to C by a registered instrument for Rs. 110. Whose title prevails? Give reasons. (B. L. 1911; 1920, Jan.)—*Ans*: The first sale being complete there remains nothing for a second transfer.

Ex. 2. A land valued at Rs. 50 is sold and delivery of possession given. Subsequently, the property is again sold by the previous owner to a third party by a registered instrument, whose purchase would prevail? Would there be any difference, if (*a*) the property be valued more than Rs. 100, (*b*) the first purchaser for Rs. 50 had already been in possession and no delivery was given after sale. Give reasons for your answers: B. L. (Int.), 1915 (Jan.):—*Ans*:—The first sale is complete, and the vendor's right to transfer is exhausted: (*a*) if the property be worth more than Rs. 100 registration is always compulsory and the second purchaser would have got priority but for the proviso of Sec. 53A, (p. 150). (*b*) Registration is necessary: see *Shibendra*

v. *Secretary of State*, 34 Cal., 207; therefore the second purchase will prevail, unless tainted with notice of any act of part performance.

Ex. 3. A sells a plot of land to B for Rs. 90 by an unregistered deed. Subsequently, A executes a deed of mortgage on the land for Rs. 50 in favour of C, which is registered. Can C enforce his mortgage as against B? B. L. (Int.), 1919 (July);—*Ans.* As there is no delivery of possession, sale to B is no sale. Therefore, C's mortgage prevails.

Ex. 4. A sells a plot of land for Rs. 99 by an unregistered deed; is the sale valid?—1920 (Jan.):—*Ans.*:—As there is no delivery of possession the sale is invalid.

Ex. 5: A property worth Rs. 150 is sold to A and delivery of possession is given to him, but no document is registered to evidence the sale. The property is subsequently sold to B for valuable consideration by means of a registred document. Can B recover the property from A? *Ans.* No, because A's possession operates as notice to B, who cannot therefore be said to be a transferee for consideration *without notice*, see sec. 53A.

Does the title to the property necessarily pass by the registration of the instrument of sale?—No; 2 C. W. N., 207. [B. L. 1912 (Jan.).]

A executes and registers a deed of sale transferring land to B and delivery of possession is given to B; but the price

When sale is complete. As sale is a transfer of ownership for a *price paid or promised or part paid and part promised*; when the price is *paid*, the sale is complete. If the sale deed be duly executed and registered but no price be paid the sale is not complete (as mere registration passes no title); Cf. 27 Cal. 7 (11); 2 C. W. N. 207; and the buyer acquires no *perfect* title; so that if the same property be afterwards duly sold for valuable consideration, the former purchaser (who has not paid the purchase money) acquires no good title against the latter. It must, however, be remembered that so far as the vendor himself is concerned the sale is complete by registration alone,

because there may be a valid sale even when the price is simply *promised.* [See 53 Bom. 321]. For example, A sells a property to B, for Rs. 3,000 by a registered conveyance ; B, however, does not pay any portion of the consideration money. Necessarily, A does not deliver possession of the property to B. B sues A to recover possession of the property. Can B successfully maintain the suit ?—Yes, the sale is complete so far as the vendor A himself is concerned. The true test in all all such cases is the *intention* of the party to transfer title. If the transaction is *intended* to be *operative* forthwith, the mere fact that the payment of consideration was postponed would not affect the validity of the transaction.* Take another question for discussion. A conveys property to B by a registered instrument, and puts him in possession but does not receive the consideration. Can A challenge the conveyance, [B L. (Int.) ; 1922 (Jan.)] Here, again the question of *intention* is paramount. If the parties intended that no title should pass till the payment of consideration, A would be entitled to challenge the sale, and the fact that even possession was delivered would not make any difference. Of course, if all the formalities are gone through, that would raise a presumption that the parties intended to pass a title forthwith, because every person is taken to have intended the natural consequence of his act. But this presumption can be rebutted by actual proof to the

stipulated is not paid. Is the sale complete ? B. L. (Int.) 1931 (Jan.). —Yes.

* *Kashidas Goshain* v. *Chaitkru,* 9 C. L. J. 239 ; See also 29 C. L. J. 250 : 2 C. W. N. 207.

contrary. Thus, if the transfer be fictitious and there be no *intention* to pass title, the transaction falls to the ground, irrespective of the fact of registration or delivery of possession, and in such a case even a stranger can show that it was never designed to effect transfer of ownership,* but was a mere *benami* transaction.

When does the ownership of a property sold pass to the purchaser? All. 1905.

Where the sale deed has been duly executed and registered and a portion of the purchase money has been paid, the purchaser acquires a good title not only against the vendor but against the whole universe, *Shiblal* v. *Bhagwan Das*, 11 All., 244. It is superfluous to mention that if there be an express condition in the deed that if the balance be not paid the transfer would pass no title, the sale (even if registered) is not complete by part payment of the consideration money; (29 C. L. J. 250; 19 C. L. J. 239. See also 2 C. W. N. 207; 55 I. C. 659).

In the case of a competition between two registered instruments of sale, priority is determined not by the dates of registration but by the dates of their respective execution. So if there be two conveyances of the same property made by registered deeds, the earlier conveyance will supersede the later conveyance notwithstanding the fact that the later instrument was registered before the earlier; see *Rajani Nath* v. *Ofajuddi*, 22 C. W. N., 318. In the Presidency of Bombay, the law

Kamini Kumar v. *Durga Charan*, 37 C. L. J. 128 Cf. 29 C. L. J. 241.

on this point was formerly different. Now, even in that province, priority is determined by the date of execution, 29 Bom., 46. Where both the conveyances are registered we need not enter into the question of delivery of possession as affecting their respective priority.

Contract for sale; A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. *It does not, of itself, create any interest in or charge on such property.*

Contract for Sale of immoveable property.

Distinction beween **sale** *and* **contract for sale**: A 'sale' passes an absolute interest in the property to the purchaser: a 'contract for sale' does not, of itself, create any interest in or charge on the property in favour of the intending buyer. A 'sale' creates a right which is good against all the world, or in other words, creates, a right *in rem*, while a 'contract for sale' creates only a personal right or a right *in personam* in favour of the contractee to compel the contractor as well as any subsequent purchaser of the same property with *notice of the contract*, to specifically perform the contract for sale, *i.e.*, to say, to execute the promised conveyance. Shortly stated, a contract for sale simply entitles the contractee to claim specific performance of the contract. [N. B.—A contract for sale, as it does not imply any transfer of interest need not be registered.* Prior to the amending Act II of 1927, the Judicial Committee

Distinguish between 'Sale' and 'Contract for Sale' of immoveable property. B. L. 1911 (July). 1928 (July). 1930 (Jan.), 1930 (Nov.) 1931 (July). Mad. 1902. All. 1922.

What is the legal effect of a contract to sell land? Mad. 1913.

Is it necessary to have a deed

* See 25 A. L. J. 513 and Act II of 1927.

for a contract for sale registered? B. L. (Int.) 1930 (Jan.).

held in *Doyal Singh* v. *Indar Singh*, 53 I. A. 214=44 C. L. J. 97 (P. C.) that a contract for sale is compulsorily registrable and to supersede this case the Act of 1927 was passed, but notwithstanding that Act the P. C. decided another case, *Skinner* v. *Skinner*, 56 I. A. 363=50 C. L. J. 487 (P. C.), seemingly re-iterating the rule in *Doyal Singh's* case, but *Skinner* v. *Skinner* may be distinguished on the ground that it dealt with a case of completed transfer which of course is compulsorily registrable, see *Nagarbashi* v. *Megnath*, 52 C. L. J. 158].

English and Indian laws compared in respect of the rights under a Contract for Sale. (Mad. 1910). 1923 (Jan.) 1925 (Jan.).

With respect to a contract for sale, there is a great divergence between the English and Indian laws. Under the English law, a contract for sale of real property makes the purchaser the owner in equity of the estate. The moment the contract is made, the vendor becomes a trustee for the purchaser, and is bound to preserve the property in its existing state pending completion of the contract, and is bound to account for all rents and profits received by him during that period. But in India, the intending vendee acquires no interest in the property; he has only the right to get a conveyance in the terms of the contract; the vendor's ownership over the property remains unaffected.* It has been held by the Calcutta High Court that where in pursuance of the contract for sale the intending vendee has paid the consideration

* See 28 Bom. 466: see also *Maung Shwe* v. *Mg. Inn*, 44 Cal., 542; 25 C. L J., 108 (P. C.)

and taken possession of the property, the position will be the same, although the legal document has not been executed and registered, subject however to an all-important proviso that specific performance of the said contract is still enforceable by suit.* The Bombay High Court goes a step further and says that in such a case, even if the time for specific performance has expired still the vendee, *as a defendant*, can resist the vendor's suit for recovery of possession on the strength of the contract.† Now, a contractee (for sale) need not rely on these decided cases for vindicating his rights, because the statute (sec. 53A) now gives him protection against ejectment.

Example :—Certain properties belonging to P were purchased at auction sale by D ; D agreed to sell back the properties to P and executed a conveyance, but it was not registered, the whole purchase money was paid by P who remained in possession. Subsequently, X bought the properties in execution of a money decree against P. P obtained a second kobala duly registered from D. Whose title would prevail, P's or X's ? [B. L. Int., 1923, July] :— *Ans* : X's [The above facts are taken from the case of *Jnan Chandra Das* v. *Hari Mohan Sen*, 22 C. W. N. 522, decided following the principle of *Walsh* v. *Lonsdale* and distinguishing 44 Cal., 542, P. C. For other cases on this point see 31 C. L. J. 75 = 24 C. W. N. 463 ; 23 C. W. N. 285].

*** *Rights of buyer under Contract for Sale* : Such a buyer is not the owner of the property. He has no interest in it in the nature of a

What is the right of person in whose favour a contract for

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* *Gajendra* v. *Moulvi Ashraf*, 36 C. L. J. 28. Cf. 22 C. W. N. 522 ; 35 C. L J. 175 ; *Walsh* v. *Lonsdale*, 21 Ch. D. 9.

† *Venkatesh* v. *Mallappa*, 46 Bom., 722.

sale has been made? How is the right enforced? May it be set up by way of defence in an ejectment suit instituted by the person who has contracted to sell? B. L. 1911 (July). 1923 (Jan.). 1925 (Jan.).

right *in rem*. In order to perfect his right over the property he must take delivery of possession when the property is below Rs. 100 or must get a registered instrument of sale in his favour. If he has paid any purchase-money he may, however, acquire a charge on the property. Such a buyer cannot apply under O. 21, R. 89. C. P. C. to set aside a sale of the property, nor can he set up a claim under O. 21, R. 58. He is not entitled to the rents and profits of the property. A contract for sale however can create an obligation which runs with the ownership of the property within the meaning of S. 40 of the T. P. Act. If the contractee for sale obtains possession, of the property, his position will be further strengthened by reason of sec. 53A.; because his possession will operate as notice within the meaning of sec. 40 to all subsequent transferees of the property and therefore necessarily bind them. According to recent opinions, the equitable rights arising under such a contract are not affected by S. 54 of the Act, *Venkata Raddi* v. *Vellappa*, 5 L. W. 234; also see 22 C. W. N. 522. Such a contractee can also enforce the execution of a conveyance, notwithstanding the fact that subsequent to his contract, the property has been attached before judgment by a creditor of the contractor, because such a conveyance is merely the carrying out of an obligation which was incurred prior to the attachment, 23 C. L. J. 115*

* In this connection the students are advised to read my article, *Has the vendor any attachable interest in the property after a Contract for Sale*, published in 21 C. W. N. at p. xiii.

The buyer can, in case of a breach of the contract bring a suit for specific performance against the seller. He may also join as a defendant a subsequent transferee of the property who purchases the property *with notice* of the contract. The buyer has also his remedy in pecuniary compensation ; but he is not entitled to any special damage without clear proof thereof. If the buyer can show that by a re-sale of the property he could make a fair profit he will be entitled to it.

In a Privy Council case* it has been held that when a plaintiff, having contracted to sell or lease the land to the defendant, brings an ejectment suit against him, the defendant, can set up by way of defence his right to demand specific performance : see also 41 Bom., 438 (F. B.)

[Q. A sells property to B for Rs. 150, B pays Rs. 50 in cash and for the balance executes a mortgage of the purchased property and another property with interest at 12 p.c. per annum. Neither A nor B registers the document executed by him, but A delivers possession to B. B does not pay this debt. What are the rights of the parties ? Give your reasons. (B. L. 1909) : *Ans.* Both the sale and the mortgage are invalid, not being registered, (Secs. 54 and 59). Apart from other circumstances A can get back his property and B his money. B, however, can treat the transaction as a contract for sale and sue for its performance. A has no *lien* over the property for his unpaid purchase-money, as there can be no lien when the sale is illegal (4 Ch. D., 562). *N. B.* The above facts are taken from the case of *Jagabandhu* v. *Radha Krishna*, 36 Cal., 920, in which the vendor was allowed to get back the property by refunding the money received. Read this case.]

* *Immudipatam* v. *Periya*, 28 I. A. 46. Cf. 46 Bom., 722.

Rights and liabilities of buyer and seller. [State briefly the rights and liabilities of seller of land. B. L. 1903.]

Sec. 55 : The Liabilities of the seller : The seller is bound (see Cl. 1.)

(a) to disclose material defects.

(*a*) to disclose to the buyer any *material defect* in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;

(b) To produce documents.

(*b*) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;

(c) to answer questions.

(*c*) to answer to the best of his information all relevant questions put to him by the buyer with respect to the property or the title thereto ;

(d) to execute conveyance.

(*d*) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;

(e) to take care of the property in the *interim* period between contract of sale and delivery.

(*e*) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;

(f) to give or deliver possession.

(*f*) to give on being so required, the buyer or such person as he directs, such possession of the property as its nature admits ;

(g) to pay public charges, rents etc.

(*g*) to pay all public charges and rents accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such pro-

perty due on such date, and except when the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(*h*) Where the whole of the purchase-money has been paid to the seller, to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power. (See Cl. 3).

(h) to produce documents etc. on payment of the purchase-money.

The Right of the Seller : The seller is entitled (See Cl. 4).—

The seller is entitled :

(*a*) to the rents and profits of the property till the ownership thereof passes to the buyer :

(a) to rents and profits until passing of the ownership.

(*b*) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase-money, or any part thereof, remaining unpaid, and for interest on such amount or part, from the date on which possession has been delivered.

(b) to a lien for the unpaid purchase-money.

The Liabilities of the Buyer : The buyer is bound (See Cl. 5) –

The buyer is bound.

(*a*) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest ;

(a) to disclose material facts known to him but unknown to the seller.

(b) to pay the purchase-money.

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs, provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the person entitled thereto ;

(c) to bear loss from destruction.

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury, or decrease in value of the property not caused by the seller ;

(d) to pay public charges and rents.

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rents which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

The buyer is entitled.

The rights of the buyer : The buyer is entitled (See Cl. 6)—

(a) to improvements, rents, and profits.

(a) Where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ;

(b) to a charge for money paid when the contract fails.

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him * * to the extent of the seller's interest in the property for the amount of any purchase-money properly paid by the buyer in

anticipation of the delivery and for interest on such amount ; and, when he properly declines to accept the delivery, also for the earnest and for the costs, awarded to him, of a suit to compel specific performance of the contract or to obtain a decree for its recission.

Saving Clause : The provision of sec. 55 will operate only *in the absence of a contract to the contrary* ; therefore any of the provisions may be excluded by agreement between the parties, *Sada Kavuar* v. *Tadepally*, 30 Mad., 284.

The contract to exclude the provisions of the section may be *express or implied.* Read *Abdulla* v. *Mammali*, 33 Mad., 446, where the vendee undertook to pay off the vendor's liability and stipulated that he would be liable for damages, in case he failed in his undertaking, and it was held that a contract to the contrary arose by *implication* to negative the statutory charge in favour of the unpaid vendor.

Seller's duty to disclose material defects in the property : How does the omission to make the disclosure affect the contract ? Does the duty extend to defects in title ? B. L. 1911, July.

Seller's liabilities : Before the sale has actually taken place, it is the duty of the seller to disclose to the buyer the material defects in the property of which he is aware but the buyer is not and which the latter could not discover with ordinary care. If the defects be not known to the seller at the time of the sale there will be no such duty imposed on him. The vendor's duty extends to the *latent* defects only ; he may not point out the *patent* defects as they are discoverable with ordinary care. Thus, where there is a pathway over a property, the seller may not mention its existence to the buyer. The vendor's duty may, however, be considerably altered by agreement between the parties, but such agreement or contract must be *specific* and not *general, i.e.*, the seller must specifically mention the liabilities he intends to avoid : a general stipulation that the buyer is to take the

What duty is imposed on the seller by

the T. P. Act to disclose material defects? B. L. (Int.) 1923 (July. 1925 (Jan.)

property "with all faults and subject to all rights, easements etc," will not diminish his liability.

An omission to make the required disclosure has been declared to be fraudulent by the proviso to sec. 53, and the whole transaction is voidable as contract induced by fraud under sec. 19 of the Contract Act, *Joychandra* v. *Sreenath*, 32 Cal., 357.

Prior to the amendment of 1929 the term "material defects" was held to include defects in *title* as well. Thus, in the case of *Gajapati* v. *Alagia*, 9 Mad., 89, it has been observed—"Even though the purchase-money has been paid and the conveyance executed by all the parties, yet, if the defect do not appear on the face of the title-deeds, and the vendor was aware of the defect, and concealed it from the purchaser, he is in every such case guilty of fraud, and the purchaser may either bring an action on the case or file his bill in equity for relief." See also 20 Bom, 522, where Tyabji J. observe, "On the whole we believe that clause 1 (*a*) of section 55 casts upon the seller the duty of disclosing to the buyer all defects whether in the *title* or in *the estate itself*". Now, effect has been given to these judicial decisions by inserting the words "or the seller's title thereto."

But if the defects appear on the very face of the title-deeds, and if the vendee had an opportunity for looking into the contents thereof the vendor's liability will cease as then the former is affected with constructive notice of the defects. [N. B.—Notice of an instrument is notice of its contents: see p. 13, *ante*.]

What are the remedies open to a purchaser where (1) he discovers defects in the property *before* conveyance and (ii) he

If the defects, which the vendor is under an obligation to disclose, be discovered *before* conveyance, the vendee can refuse to complete the transaction and if thereupon the vendor sues him for specific performance of the contract he can successfully defend himself; he can also recover back whatever he has paid as earnest money. If the defects are discovered *after* conveyance, the non-disclosure being

declared *fraudulent* by the proviso to the section, the contract can be rescinded and status *quo ante* may be restored and suitable compensations may be awarded for the loss sustained. But where the defects are such that the law casts no obligation on the vendor to disclose and consequently the non-disclosure is not fraudulent, there can be no avoidance of the contract. In such a case the vendee cannot even claim compensation if there be no express stipulation to that effect.

discovers defects after conveyance. B. L. Int. 1930 (Nov.)

The next duty of the seller antecedent to the sale is to *produce* the title-deeds in his *possession* or *power* for the inspection of the buyer; but he may not hand them over to the latter.

The Vendor's duty to produce title-deeds.

The section is silent as to the deeds which are neither in his possession nor within his power. After the completion of the sale the buyer becomes entitled to retain possession of the deeds (see sec. 55, sub-cl. 3).

Upon payment or tender of price, the vendor is bound to execute a conveyance if the purchaser tenders it to him for execution. It is the duty of the purchaser to tender a conveyance and until such tender is made or waived, the purchaser has no right to obtain the title-deeds, 31 C. L. J., 87, (P. C.).

Since the date of the contract for sale the vendor is bound to take proper care of the property although the buyer may not, at the time, have any interest in it. The vendor has been enjoined to take the same care of the property as an owner of ordinary prudence would take of it. In other words, the vendor must take the same care of the property as a trustee would take of the property of his *cestui que trust.*

Seller's duty to take care of property.

The ownership of the property passes from the vendor to the vendee as soon as the instrument of sale is executed and registered; therefore from that date the purchaser becomes entitled to claim possession. So, if the seller retains possession of the property after that date it *obviously* becomes adverse for the purposes of limitation. If before delivery of

Seller's duty to give possession.

possession the seller becomes dispossessed, the buyer is not bound to pay the price, but he may repudiate the contract.

Covenant for title. What is the remedy for breach of such covenant? How may the implied covenant be excluded? B. L. (Int.) 1912 (Jan.) 1913, 14, 16.

A seller is bound to give a marketable title; therefore, a sale conveys with it a warranty of title on the part of the seller and if the warranty is broken, the buyer is entitled to compensation from the seller for the loss caused by the breach of this implied warranty. The right of action arises on the execution of the conveyance and not on discovery of the defect of title. The benefit of this rule may be lost to the purchaser by—(i) fraud, (ii) notice, (iii) waiver, (iv) express contract to the contrary. "The implied covenant may be excluded either by *a contract to the contrary*, *i e.* by a special covenant for title, or by proof that the buyer having knowledge of the facts was content to take such title as the seller might in fact have, in which case the buyer obviously could not complain if it turned out that there was no title. In the other case, on the principle *express facit cessare tacitum* the buyer could rely on the special contract only, for it would be inferred that the intention was to exclude the statutory covenant." Shephard and Brown; 7th Ed., p. 204 But when the covenant for title is *express*, the buyer is entitled to an action inspite of a personal knowledge of the defects.

When special contract for title excludes the statutory one? B. L. (Int.) 1914 (Jan.) 1916 (Jan)

A covenant for title must be distinguished from one for queit enjoyment. The main distinction between the two species of covenants is that in the one the vendor has title, but it is defective, whereas in the other there is no title at all.

Examine whether and how far the old rule of Caveat Emptor applies to sale of immoveable property under the T. P. A. Mad. 15. All, 1925.

N. B.—The benefit of the covenant for title runs with the land and enures for the personal benefit of the buyer as well as for his transferee, (see p. 101, *ante*). It should be noticed that the old English rule of *caveat emptor* (Beware purchaser) has now practically become obsolete in this country by reason of the rules of this section. In case of sales *in invitum*, the principle of *caveat emptor* still applies, because the Court does not hold out any guarantee of title to the auction-purchaser.

Where the property is not sold *subject to incumbrances*, such incumbrances should be paid by the vendor. When the property is sold *free from incumbrance*, should any charge on it be subsequently discovered, the vendee will be entitled to pay off the charge to free his title and hold his vendor responsible for the same, *Nathu Khan* v. *Thakoor Bartonath*, 26 C. W. N. 514 (P. C.).

Buyer's right to documents of title. 1931 July.

The general rule is that the seller is bound to deliver to the buyer all the documents of title which are in his possession or power, but he may refuse their production till the whole purchase-money has been paid. Counterpart-leases, Kabuliyas are all documents of title within the meaning of this rule and pass to the purchaser. Collection-papers and account books, though strictly speaking they are not documents of title, may yet be claimed by the buyer for his use.

The *proviso* under this sub-section is to be noticed ; it cites two exceptions to the above rule : (*a*) When the seller retains any part of the property comprised in the 'documents of title,' he is entitled to retain them ; (*b*) When the property is sold to different buyers, the buyer of the greatest lot is entitled to retain the said documents. But the retainer in all cases is bound to keep the documents under safe custody and to produce them for inspection whenever required.

What is an unpaid vendor's lien ? B. L. (Int.) 1912 (July.) 1931 (July.) Mad., 08, 14.

Seller's Rights : fall under two heads ; (*a*) *to rents and profits* up to the date of the conveyance ; (*b*) *to a charge* on the property for the unpaid purchase-money.

A seller has a charge upon the property for the unpaid purchase-money, or he has what is known as a **vendor's lien**, *i.e, a lien* on the property until his purchase-money has been fully paid to him. Formerly, an unpaid vendor could withhold possession from the buyer, but in the case of *Velayutha* v. *Govinda Swami*, 30 Mad., 524 ; 34 Mad., 543, it has been ruled that the vendor's lien is *non-possessory*, *i,e.*, he cannot retain possession of the property on the ground that a portion of the purchase-money is still unpaid. In a recent Calcutta decision, *Nilmadhab* v. *Hara Prasad*, 19 C.L.

Discuss the rights and liabilities of a seller in the following case.

(a) Charge for unpaid purchase-money. B. L. 1911, (July). 1916, (Jan.)

J., 146, 150, a further modification has been introduced in *Velayutha's* case, *viz.* before a decree for possession is passed in favour of the vendee he may be compelled to bring the unpaid purchase-money into Court, or he may be subjected to some other suitable restrictions and conditions. This Calcutta decision is more reasonable than the Madras decision.

Against whom the above charge is available, How is the charge for unpaid purchase-money enforced ? B. L. 1911, (July). 1919, (Jan.)

Under this sub-clause, as it stood before the amendment, the vendor's lien for the purchase money could be enforced against the property in the hands of the buyer only. So if the buyer had already parted with his interest, the vendor could not any more follow the property for satisfaction of his lien. The present amendment remedies this defect. Now, the vendor can enforce his lien against the property in the hands not only of the buyer, but also of all gratuitous transferees and all transferees with notice of the lien. The vendor is however powerless as against a transferee (from the buyer) for value without notice.

The charge may be enforced by a suit for sale of the property framed under O, xxxiv. r, 15, of C.P.C.

How is the charge excluded or lost ? Mad. 1914

The charge may be excluded by express agreement between the parties (by force of the saving clause governing the whole section) ; or, by conduct which amounts to an estoppel. For instance, where the vendor endorses a receipt for the whole purchase-money on the back of the sale-deed, he cannot on the ground of estoppel enforce his charge against a subsequent transferee from the vendee who takes the property believing that nothing remains due. The seller's charge is not however excluded by a contract which is not inconsistent with the continuance of the charge. Thus, where the purchase-money is agreed to be paid in instalments or where there is a personal contract to defer payment of a portion of it, the charge is not lost, *Webb* v. *Macpherson*, 31 Cal. 57 (P. C.)* But where the consideration for sale was a yearly rent charge, the charge was held to be lost, *Jersey* v. *B. P. Dock*

* Also see 43 All., 314 and 544.

Co., L. R. 7 Eq., 409. The lien may be lost when the vendor takes a new security in lieu of his original one.

Ex. *L* conveyed a property to *T* by an indenture which contained the recital that a portion of the consideration was paid on or before the execution of the document and the balance was to be secured by the formal undertaking of the purchaser. By a memorandum or undertaking of a subsequent date *T* contracted to pay *L* the said balance by certain yearly instalments. Some instalments were paid, but default was made in respect of the payment of subsequent instalments. Is *L* entitled to a charge on the property for the unpaid instalments due to him? B. L. (Int), 1914 (Jan.)—*Ans*: Yes, under the T. P. A. the lien of an unpaid vendor is a statutory charge, and as such cannot be excluded by a mere personal contract to defer payment of a portion of the purchase-money or to take purchase-money by instalments; See *Webb* v. *Macpherson*, 31 Cal., 57 (P. C.)

The sub-clause has been amended also to make it clear that the interest on the unpaid purchase-money should run from the date when the buyer is put in possession.

Buyer's duty to disclose material facts. All. 1926 (Ext.)

Buyer's Duties. Like the seller, the buyer too is under an obligation to disclose facts regarding the *nature* or *extent* of the seller's interest, which materially increase the value of the property. Thus, where the buyer knows, and the vendor does not, that the prior tenant-for-life has died, the former is bound to disclose the fact to the latter. We have seen that a seller is bound to disclose *latent* defects: but the duty of the buyer is otherwise; he is not bound to disclose *latent* advantages, *e.g.* he is not bound to disclose the existence of a mine which is known to him and unknown to the seller. (B. L. Int., 1921, Jan.; 1922, July).

Buyer's liability for loss. B. L. (Int.) 1912 (Jan.)

We have seen in sec. 54 that after the contract for sale and before actual conveyance no interest in the property passes to the buyer; so it is reasonable that all accidental losses or disadvantages occurring to the property should not affect the buyer. The English law is somewhat different from the above rule; under that law the buyer becomes the

equitable owner as soon as the contract is made, so he may be made to pay the consideration although before the execution of the conveyance the property itself is destroyed. See 12 of the Spec. Relief Act which, based on English Law, cities the following illustration—"*A* contracts to sell a house to *B* for a lakh of rupees. The day after the contract is made the house destroyed by a cyclone. *B* may be compelled to perform his part of the contract by paying the purchase-money." From this it appears that the buyer's liability for loss arises even before the conveyance is executed. But if *B* be compelled to pay the consideration, *A* will be liable for compensation under sec. 14 of the same Act. Again, if *A* sues for specific performance *B* can resist his demand under sec. 15 (Spec. Relief Act). Though, the Specific Reliet Act, following the English law, lays down a rule contrary to that of the T. P. Act, still by a cumbrous procedure it seeks to achieve the same object as the latter Act. Even if there be real conflict between the two Acts the T. P. Act should prevail, being a latter enactment. Sec. 54 of the T. P. Act completely exempts the buyer from all liabilities for loss and is thus in direct contrast to the English law. The buyer's liability under T. P. Act arises only *when the ownership has passed* to him by the execution of the conveyance.

A contracts to sell house to *B* for a lakh of rupees. The day after the contract is made, the house is destroyed by a cyclone. Can *B* be compelled to perform his part of the contract by paying the purchase-money?—No; not under T. P. A. B. L. (Int.) 1912 (Jan.) 1915 (July). 1922 (Jan.)

Buyer's rights : The buyer is entitled to the benefit of all improvements, rents and profits after the ownership has passed to him. But when a tenant has, in ignorance of the transfer, paid rents to the seller, the buyer cannot realise them from him (Sec. 50). His remedy will then be against the seller. Thus, *A* sells his property to *B* but does not deliver possession and continues receiving rents from the tenants who were ignorant of the sale,—what is *B*'s remedy?—*B*'s remedy does not lie against the tenants but lies against A. As to *improvements* between the date of the contract and that of the conveyance, we are apt to think that they attach to the property and enure to the benefit of the person to whom it passes.

Buyer's right to improvements, rents and profits. B. L. 1909.

When the buyer has paid the purchase-money and the sale fails because of non-disclosure of facts or of other causes, he acquires a charge over the property which is enforceable like the vendor's charge for unpaid purchase-money by a suit under O 34, R. 15, of C. P. C. This may be described as the **vendee's lien** : Under the clause, as it stood before the amendment, the vendee's lien could be enforced against he seller and all persons claiming under him *with notice of the payment*. The effect of the provision was that the transferees and legal representatives of a seller could escape all liability for the amount received by the seller by pleading that they had no notice of the payment of the purchase-money. The reasons for limiting the vendee's lien against third persons to cases of actual notice were considered by the Legislature not to hold good in the case of the vendee's lien against persons claiming under the original seller ; Therefore, the words "with notice of the payment" have been omitted to make it clear that all persons claiming under the original seller are liable irrespective of the question whether they had, or had not, notice of the advance payment. This makes the vendee's lien a right *in rem* quite like a mortgage. The wording of this cl. 6 (*b*) is not very happy and should be closely followed. If the vendee improperly refuses to complete the sale he gets no charge for his purchase money ; he gets a charge only if he does not do that. If his refusal to complete the sale is justified, he gets a charge also for the earnest money. A difficulty arises in this sub-cl. from the distinction between the earnest money and the purchase-money ; though in point of practice such distiction is seldom made.

Buyer's charge for money paid.

Q. 1. *A* agrees to buy a house from *B* and pays the price, but before the conveyance is executed the house is totally destroyed by an earthquake. What is *A*'s remedy ? What difference, if any, would it make if *A* has only taken a long lease of the house ?—*A* will get back his money from *B*. In the second case, *A* has a right to avoid the lease.

Marshalling by subsequent purchaser.

Sec. 56 : Marshalling of sale : If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, *in absence of a contract to the contrary*, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

The section has been wholly recast and brought into line with section 81 which deals with the marshalling of securities. Therefore, for the principle of this section refer to that section. The old section, it will be noticed, began with the words "Where *two* properties are subject to a common charge," and did not provide for the case where there are *more* properties which are subject to a common charge and some or one of them was afterwards sold. The present amendment contemplates not only *two* properties subject to charge but also provides for the case of a plurality of properties. Under the old section, the right of marshalling in the case of sale was given "as against the seller," see 31 Mad., 419 ; 42 All. 336, cited below. See also 17 All. 434. In 13 Bom. L. R. 678, the High Court of Bombay also held that sec. 56 applied only as between a seller and his buyer and not as between a mortgagee of the seller and the buyer. The present amended section does not emphasise the buyer's remedy *as*

against the seller only, but gives the buyer a chance as against the mortgagee, provided the rights of the mortgagee or any person claiming under him are not in any way prejudiced thereby. The provisions of this section have no application to a case of auction-sale, *Naubat Lal* v. *Mahadeo*, 51 All. 606.

It should be noticed that the whole section applies only in the absence of a contract to the contrary; so the operation of this section can be excluded by express stipulation.

Ex. 1. A mortgages Blackacre and Whiteacre B. A subsequently sells Blackacre to C. Can C insist upon B's selling Whiteacre first to recover his mortgage-money before selling Blackacre. State your reasons—B. L. (Int.), 1917 (August)—*Ans* : Yes ; C has the right to insist that the property not sold to him must be proceeded against first and the property purchased by him must be sold only for the balance, if any due : The contrary view taken in *Din Doyal* v. *Gursaran*, 42 All, 336 and *Appayya* v. *Rangayya*, 31 Mad., 419 (F. B), is no longer good law.

Ex. 2. A mortgages Blackacre and Whiteacre to B, and subsequently sells (for consideration) Blackacre to C and Whiteacre to D. (i) can C or D claim marshalling ? (ii) Would it make any difference if D had received Whiteacre by gift instead of by sale ?—*Ans* : (i) No marshalling ; both C and D being transferees *for consideration* cannot marshal to the prejudice of each other, (ii) C can marshal, although that will prejudice D ; D is here a mere gratuitous transferee and not one for consideration.

Discharge of Incumbrances on sale.

Sec. 57. (*a*) : Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, *Provision by Court by incumbrances,*

and sale freed therefrom. the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,—(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and (2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons thinks fit to require a larger additional amount.

(*b*) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing thinks fit to dispense with such notice declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retenion and investment of the money in Court.

(*c*) After notice served on the persons interested in, or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(*d*) An appeal shall lie from any declaration, order, or direction under this section as if the same were a decree.

(*e*) In this section "Court" means (1) a High Court in the exercise of its ordinary or extra-ordinary Original Civil Jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof

is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

N. B.—This section has been enacted to facilitate the realisation of fair value for encumbered estates.

CHAPTER IV.

MORTGAGES OF IMMOVEABLE PROPERTY.

Ancient Law of Mortgage :—The earliest traces of the law of Mortgage can be found in the Roman Law of *mancipitio contracta fiducia*, *i.e*, a sale with a contract or agreement for redemption ; or in other words, it was an actual conveyance of property upon an agreement that if the purchase-money were repaid, the lender would reconvey it (the property) to the borrower. But this was not a convenient form of mortgage ; because, if the lender sold away the property the borrower could not follow it in the hands of the purchaser; so in time, the simple form of *Pignus* came to supersede it : while the *Fiducia* gave the lender both possession and ownership, *Pignus* gave him only possession leaving ownership with the borrower. A further improvement was achieved in the *Hypotheca* which retained both the possession and ownership with the debtor giving the creditor a *real* right in the nature of servitude over the property. Ultimately the power of sale was conferred on the pledgee, and thus the property became a *security* for his money. Thus, we have three distinct stages in the history

of Roman mortgage law—Fiducia, Pignus and Hypothecation with the power of sale.

Mortgage defined by T. P. Act. B. L. 1901. 1911 (Jan.) 1912 (Jan.) 1925 (Jan). 1930 (July).

Sec. 58. Mortgage defined :—A Mortgage is the transfer of an *interest in specific immoveable property* for the purpose of securing the payments of debts, present or future, or the performance of an obligation which may result in a pecuniary liability.

In the first place, a mortgatge is a *transfer* and in the next place it is a transfer of interest in *specific* immoveable property. The property should be *distinctly* specified, that is, the description of the property given in the mortgage instrument should sufficiently identify it. A mortgage created on the *entire* immoveable property of the mortgagor is too vague to create a mortgage. A mortgage may be created to secure payment of a *debt*, whether present or future or to secure performance of an obligation which may give rise to some pecuniary liability. Thus, A can mortgage his properties for a certain amount which he undetakes to pay as damages in the event he fails to carry out a certain contract. As to mortgage created to secure a future debt see sec. 79, *infra*. A mortgage not supported by consideration is however unenforceable.

It ts worth our while to note that a mortgage, though a form of transfer, does not pass off the entire interest of the mortgagor to the mortgagee. It is a mere *jura in re aliena*, *i.e*, an estate carved out of full ownership. The full ownership or dominion always rests with the mortgagor and the mortagee gets a mere interest in the property in the shape of a security for the money he has advanced. Hence, it is commonly described as a *security for the repayment of money or money's worth.* So in the mortgaged property a double interest is created. One is absolute ownership residing with the mortgagor and the other is a *jura in re alena* in favour of the mortgagee. The

former is manifest in what is commonly called the *equity of redemption*, that is, the mortgagor's right to get back his property until foreclosure on payment of the motgage money. The latter gives the mortgagee a right to foreclose or debar the mortgagor's right to redeem the property in case of his inability to pay off the debt within a fixed time. The mortgagor being the owner of the property may without the consent of the mortgagee, but subject to his rights, pass off his interest, whereas the mortgagee can transfer only his mortgage-debt.

Can moveable property be mortgaged? If so, how will you distinguish it from a pledge? All. 1921 (Ext.)

Mortgage of Moveable Property is not provided for in the T. P. Act which applies only to *immoveable property* or *realty*. But it is not therefore to be inferred that chattels cannot be mortgaged. Hypothecation of moveable property followed by delivery of possession is not rare in this country. Even a mortgage of moveable property unaccompanied by delivery of possession has been held to be valid, *Deane* v. *Richardson*, 3 N. W. P., 54. The provisions in the Act regarding attestation and registration do not apply to a mortgage of moveable property, 12 C. L. J. 419

Distinction between a pledge and a mortgage.

There is however a distinction between a **pledge** of moveable property and a **mortgage** of moveable property. A mortgagee is entitled to foreclosure, that is to say, if the debt be not paid within a specified time, the chattel will become his absolute property. But a pledgee has no right to foreclose but has only the right to bring the chattel to sale and satisfy his debt out of the sale proceeds: *Harrold* v. *Plenty*, 2 Ch. 314; also *Mahamaya* v. *Haridas*, 44, Cal, 455 : 20 C. L. J. 183. A mortgage is always a security for money or money's worth, while a pledge may be given for the performance of a promise not giving rise to any pecuniary liability. Besides, in a pledge there must be a delivery of possession, actual or constructive, but a mortgage may exist without delivery.

Discuss the validity of a mortgage of

A mortgage of Non-existent Property, though inoperative as a conveyance, is operative as an executory

property which is to come into existence in the future. 1920 (July). 1927 (July).

agreement, which attaches to the property the moment it is acquired, and in equity, transfers the beneficial interest to the mortgagee, without any new act done by the mortgagor to confirm the mortgage; (Per Mookerji J. in *Khobari Singh* v. *Ramprosad*, 7 C. L. J., 837). Cf. notes at p. 25. It is a contract to transfer the after-acquired property, and when the property comes into existence in the future, equity fastens npon the property, with the result that the contract to assign ripens into a complete assignment.

Name the different kinds of mortgages enumerated in T. P. Act. B. L. (Int) 1915 (Jan.) 1927 (July). 1932 (Jan).

Classification : The T. P. Act contemplates six kinds of mortgages : They are :—

(*a*) Simple mortgages.

(*b*) Mortgages by conditional sale.

(*c*) Usufructuary mortgages.

(*d*) English mortgages.

(*e*) Mortgages by deposit of title deeds or Equitable mortgages, as commonly called.

(*f*) Anomalous mortgages.

Kinds of mortgages recognised by the T. P. Act. B. L. 1905. B. L. 1914 (Jan.) 1931 (Jan.) All. 1903. Mad. 1899.

State and distinguish the different types of mortgage so as to show the leading features of each. B. L. (Int.). 1926 (July). 1928 (Jan).

Simple Mortgage : is a transaction in which the mortgagor, without delivering possession of the mortgaged property, ***binds himself personally*** to pay the mortgage money, and agrees, expressly or impliedly, that, in the event of his failng to pay according to the contract, the mortgagee shall have a right to *cause* the mortgaged property to be sold and the proceeds of sale to be applied in payment of the mortgage money.

In a simple mortgage there are the following elements ; (*a*) a personal obligation on the part of the mortgagor to pay the debt, (*b*) an express or

implied* power given to the mortgagee to cause the property to be sold through the intervention of the Court, (*c*) no transfer of ownership. So, invariably in a simple mortgage, the mrotgagee must have the power to sell the property. But the sale cannot be made out of Court. The words "cause to be sold" plainly indicate that it must be through the intervention of Court. So, in order to avail himself of his security the mortgagee should first get a decree directing the sale of the mortgaged property. The Madras High Court is however unique in holding that this right of sale exists even where no decree has been obtained. The only three cases where sale without the intervention of the Court is valid have been mentioned in sec. 69. A simple mortgage is a very convenient form of mortgagee as it gives a sufficient security to the mortgagee without saddling him with the responsibilities of a mortgagee in possession (see sec. 76).

What interest in the mortgaged property is transferred to the mortgagee by simple mortgage? B. L. (Int.) 1911 (Jan.). 1930 (July).

In a pure simple mortgage, the mortgagee is not put into possession of the property pledged to him. The debtor merely parts with the right of sale and nothing more. It is a right *in rem* realisable by sale given to a creditor by way of accessery security to a right *in personam* (Holland's *Jurisprudence*, p. 202). A simple mortgage corresponds to the hypothecation of the Roman Law and is in the nature of an "equitable charge" of the English Law. It does not vest any *estate* in the mortgagee but only creates a charge as an incident to the debt (Ghose's *Mortgage*). A simple mortgagee has therefore a two-fold cause of action : one arising

* "In a simple mortgage the mortgagor undertakes personally to pay the mortgage money. But such undertaking need not be expressed, for an implied promise to pay will arise out of the mere acceptance of the loan."—Ghose's *Mortgage*, pp. 78-79.

out of breach of the covenant to pay and the other arising out of the hypothecation : and he can sue the mortgagor on both the causes of action in one suit. The mortgagee can as well bring successive suits for these two causes of action ; he may first sue for the mortgage-debt and then sue for the sale of the mortgage-property. But this he can do only subject to the provisions of O. XXXIV, r. 14. C. P. C., which says that he cannot put the mortgaged property to sale except in a suit for sale in enforcement of the mortgage, otherwise the mortgagor's right of redemption may be defeated. Ordinarily, a simple mortgagee first seeks to realise his money from the security and if the security proves insufficient for the purpose, he asks for a further personal decree under Or. XXXIV r. 6, C. P Code. The remedy against the *property* is open for 12 years and that against the mortgagor *personally* for 6 years. So if the mortgage suit is instituted after 6 years from the due date the mortgagee loses his remedy against the mortgagor *personally*.

Ex. A executes a simple mortgage in favour of B and then transfers the property to C. On sale of the property in execution of the mortgage decree obtained by B the whole amount of the debts is not realized. From whom can B recover the balance A or C?—[Cal. 1922, July] : ***Ans*** :— C simply purchases the property subject to B's mortgage and not the personal obligation of A. Therefore, the balance can be recovered from A only and not from C.

B. L. 1906, 1931 (July) All. 1903, 1926 (Ext.).

How is a mortgage by conditional sale enforced? B. L. 1906.

What are the essentials of a mortgage

Mortgage by Conditional Sale is a transaction in which the mortgagor *ostensibly* sells the mortgaged property on condition (1) that in default of payment of the mortgage-money *on a certain date*, the sale shall become absolute ; but on such payment being made, (2) the sale shall become void, or (3) the buyer shall re-transfer the property to the seller. *It must be distinctly noted that the transaction will not be considered to be a*

mortgage unless the aforesaid condition as to payment is embodied in the very same document which ostensibly *purports to effect the sale.*

by conditional sale ? B. L. (Int.) 1929 (July) 1930 (July).

In this form of mortgage there is no personal liability on the part of the mortgagor to pay the debt. The remedy of the mortgagor is by foreclosure only. The mortgagee in this form must remain content with the property under mortgage and cannot look to the other properties of the mortgagor, the latter not having any personal liability. For this reason a mortgage by conditional sale may be said to be a less convenient form of mortgage than a simple mortgage. A mortgage by conditional sale is an *ostensible* sale which is to ripen into an absolute sale on breach of the condition as to payment ; or, in other words, on the breach of the condition, the contract executes itself and the transaction is closed and becomes one of absolute sale to be enforced in a particular manner*, called *foreclosure.* A mortgage is foreclosed by obtaining a declaration from the Court to the effect that the mortgagor will be debarred of his right of redemption. Such a declaration ripens the ostensible ownership of the mortgagee into absolute ownership. The mortgagee having no right against the other properties of the mortgagor, he suffers prejudice if the property foreclosed is of no sufficient value. A mortgage by conditional sale is non-possessory (*i.e.* no delivery of possession is given under it) and therefore the mortgagee has not

What is the remedy of the mortgagee in such a case ? B. L. (Int.) 1930 July.

* *Sheoram Sing* v. *Babu Singh*, 48 All., 302.

the advantage of an usufructuary mortgage to repay himself. The effect of the new proviso represented by the aforesaid lines in *italics* should also be noticed. Now, the condition as to the *ostensible* sale ripening into an absolute sale or becoming void by reason of non-payment or payment (as the case may be) of the mortgage money should be embodied in the document in question. "In order to escape the liability of accounting for the profits of the property and other liabilities imposed on a mortgagee and also to escape the provisions of some of the local laws enancted for the benefit agriculturists, creditors resort to the mode of having a mortgage which is in form an out and out sale" (Das Committee Report), and in such cases the question often arises as to whether the transaction is a mortgage by conditional sale or a sale with a condition for repurchase and the intention of the parties one way or the other is considered to determine the question. The Judicial Committee have ruled in *Balkishen Das* v. *Legge*, 22 All., 149 that such intention is to be gathered from the terms of the document itself and no extraneous evidence is admissible for the purpose of determining such intention. Accepting this dictum, the Legislature have inserted the above proviso making it clear that no transaction should be deemed to be a mortgage by conditional sale unless the condition as to reconveyance is embodied in the document itself.

_N. B._—Mortgages by conditional sale are known in Bengal as _Kat-kobala_, and in U. P. as _Bye bil-w a_.

*** *Distinction between a mortgage by conditional sale and a sale with a clause for repurchase* : "*Prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase."* A mere stipulation for re-conveyance contained in the instrument of sale or in any contemporaneous instrument does not make the transaction a mortgage, and therefore does not give the mortgagor any right of redemption. Whether a particular transaction is a mortgage by conditional sale or an out-and-out sale with a right of repurchase is to be determined by the *intention* of the parties as gathered from the terms of the deed itself.† If the relation of debtor and creditor is intended to subsist, the conveyance will amount to a mere security and therefore a mortgage. In the case of a sale with a clause for repurchase, the whole transaction is a *bonafide* sale, there is no relation of debtor and creditor subsisting between the parties ; and the right of re-purchase must be exercised within the fixed time, as in this case the time is regarded as the essence of the contract. Forfeiture is the immediate consequence of non-exercise of the right of re-purchase within the fixed time : or, in other words, the terms of the proviso of re-purchase must be strictly

How do you differentiate between a Mortgage by conditional Sale and a Sale with a *clause* for repurchase? B. L. 1909. 1922 (Jan.) 1930 (Nov.) All. 1921, 1922, 1923, 1926 (Ext.).

What tests must you apply to decide whether a transaction is a mortgage or a sale with an option to repurchase? B. L. (Int.). 1929 (July).

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* *Per* Peacock J. in *Bhagwan Sahai* v. *Bhagwan Din*, 12 All., 387.

† *Jhanda* v. *Waheduddin*, 38 All., 570=25 C. L. J. 524 (P. C) ; also *Mathura* v. *Jagdeo*, 49 All., 405 : and 42 Mad. 407 (F. B.)

All. 1903. Mad. 1907.

complied with, *Barrel* v. *Sabine*, I Vern. 268. In the case of a mortgage the conveyance being a mere security a failure to fulfil the strict terms of the instrument is not visited by immediate forfeiture. Formerly, payment of interest by the conveyancer or retention of possession of the property or enjoyment of profits thereof by him or inadequacy of the consideration money were considered sufficient to warrant an inference that the transaction was merely pignorititious,* but now such extraneous circumstances will not be of much importance unless the condition giving it a pignorititious character is contained in the deed itself.

Recapitulation : The following points should be remembered with respect to a mortgage by conditional sale : (*a*) It is an ostensible sale ; (*b*) In default of payment, the apparent sale ripens into actual sale, (*c*) but on payment the buyer has to re-transfer the property : (*d*) The remedy is by foreclosure and not by sale, (*e*) there is no personal covenant to pay on the part of the mortgagor : (*f*) No possession is delivered under it.

[Q. What is the effect of a deed of sale when there is a simultaneous oral agreement to reconvey the property on payment of the purchase-money with interest ? B. L. (1906)—***Ans***. As here no security is desired, the effect will be a *sale with a clause for re-purchase*. The oral agreement to reconvey does not require registration ; therefore, it is admissible in evidence under Sec. 92, *proviso* (4), of Act I of 1872. Besides, the condition as to reconveyance not being embodied in the document itself, as required by the new *proviso*, there can be no mortgage by conditional sale at all.

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* *Raja Bahadur* v. *Raja Panuganti*, 47 Mad., 729=29 C.W. N. 246=40 C. L. 481 (P. C.) ; also see 46 All., 173.

N.B.—The distinction between the two cases of *Bhagwan Sahai* v. *Bhagwan Din* and *Balkishen Das* v. *Legge*, cited above, should be carefully noted. They are apparently contradictory, but on a careful scrutiny it will be found that the one supports the other. Both these cases have been reviewed by Maclean C. J. in the case of *Kinuram Mandal* v. *Nitya Ch. Sirdar*, 6 C. L. J., 208, which the students are advised to read. Remember always that in such a case the *intention* of the parties is the real test for judging whether a transaction is a mortgage or a sale, and that such intention must be gathered from the language of the document itself.

Define and explain 'usufructuary mortgage'. B. L. Int. 1930 (Nov.)

Usufructuary Mortgage is a transaction in which the mortgagor delivers possession *or expressly or by implication binds himself to deliver possession* of the mortgaged property to the mortgagee and authorises him to such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property *or any part of such rents and profits* and *to appropriate the same* in lieu of interest, or in payment of the mortgage money or partly in lieu of interest and partly in payment of the mortgage-money.

In this form of mortgage the property is given as security to the mortgagee who is let into possession or is promised to be let into possession of the property and is permitted to *repay himself* out of the rents and profits of such property or out of a portion thereof. Two points must be carefully noted with respect to a usufructuary mortgage, (i) possession must be made over to the mortgagee, or the mortgagor must expressly or impliedly bind himself to deliver possession and (ii) the mortgagor will not be personally liable

unless there is a distinct agreement to the contrary. An usufructuary mortgagee having the opportunity of *repaying* himself, is not put to the necessity of going to Court. This position accounts for the *prohibition* in sec. 67 denying him the right of foreclosure and sale. Not being obliged to bring a suit, a usufructuary mortgagee has not to be afraid of limitation. In this respect such a mortgagee occupies a very advantageous position. He has another advantage. If the mortgagor neglects to bring a redemption suit in time, he gets an opportunity for prolonged enjoyment of the property. If no redemption suit is brought within 60 years, he becomes absolute owner of the property. One great disadvantage of this form of mortgage is that the mortgagee is under an obligation to exercise great care and caution in the management of the property and he is to account for his receipts of the usufruct of the property. Another disadvantage is that it involves the locking up of one's money, because the usufruct of the property may not be sufficient to repay any part of the principal after payment of interest. As to when a usufructuary mortgagee can sue the mortgagor *personally* for the mortgage money see sec. 68. Formerly, a usufructuary mortgage covered only the case of delivery of possession by the mortgagor, and not the case in which the mortgagor expressly or by implication bound himself to deliver possession. So in a Madras case* in which the usufructuary mortgagee sued

* *Subbamma* v. *Narayya*, 41 Mad., 259, F. B.

for the mortgage money under sec. 68 (c) alleging that he was entitled to possession of the property but the mortgagor failed to deliver the same, the High Court held that as no possession was delivered there was no usufructuary mortgage; consequently, under sec. 67, there could be a decree for sale only and not for foreclosure. The learned judges in this case overlooked the fact that a suit for the mortgage money could lie under sec. 68 (c) only on the footing that the transaction was a usufructuary mortgage. So, the position was that for the purposes of sec. 68, the transaction was a usufructuary mortgage, but for the purpose of sec. 67, it was not so. To remove this anomaly the present amendment has been made making it clear that there can be a usufructuary mortgage in a case where the mortgagor binds himself, expressly or by implication, to deliver possession.

N. B.—In Bengal a usufructuary mortgage is known as *Khai Khalasi* mortgage.

Recapitulation: Points to be remembered regarding a usufructuary mortgage: (1) Delivery of possession to the mortgagee or an undertaking to that effect: (2) No personal covenant to pay: (3) No remedy either by foreclosure or by sale: (4) No redemption until repayment of the mortgage debt (with interest) by the usufruct or by the mortgagor personally.

Intention of the parties is the real test for determining whether the transaction is a lease or a mortgage.

*** *Distinction between Usufructuary Mortgages and certain Leases*: There are certain leases which so closely resemble this form of mortgage that it is a matter of great interest to distinguish them from it. Zuripeshgi leases, for example, are based on the same principle as a usufructuary mortgage.

Here too, as in the other, possession coupled with the right of taking the profits of a property is made over to the creditor for the money advanced, So, where we have to determine whether a transaction is a mortgage or a lease, we must look to the *intention* of the parties to it. If we find that the lease is, in fact, meant as a security for the money advanced to the lessor, it is to all intents and purposes, a mortgage. Once you get a debt with the security of land for its repayment, then the arrangement is a mortgage by whatever name it is called (Ghose's *Mortgage*).

English Mortgage is a transaction in which the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property *absolutely* to the mortgagee but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed.

All. 1924
1931 (July).

The essential characteristics or ingredients of an English mortgage.
1930 (July).

The *essential ingredients* of an English Mortgage may be enumerated as follows* :—

(1) that the mortgagor should bind himself to repay the mortgage-money on a certain day, *i.e* there should be a personal covenant to pay.

(2) that the property mortgaged should be absolutely transferred to the mortgagee :

(3) that such absolute transfer should be made subject to the proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage-money on the fixed day.

* See *Rukmini Kanta* v. *Baldee Das*, 28 C. W. N. 920, 926.

Though the property is sold *absolutely* to the mortgagee, delivery of possession to him is not absolutely indispensable. The English mortgagee taking an absolute transfer has however the right to enter into immediate possession of the property. The remedy of such a mortgage is by sale and not by foreclosure (*vide infra*). Under sec. 69, an English mortgagee (if the parties belong to the European, Jew or Parsi communities) can exercise this right of sale *privately, i.e.*, without the intervention of the Court. This right of private sale is a distinct advantage as it obviates the necessity of resorting to law Courts for realisation of the mortgage money. But this right of private sale does not exist if any of the parties to the mortgage is a Hindu, Mahomedan or Buddhist.

*** *Distinction between English Mortgage and Simple Mortgage:* In both, there is a personal covenant to pay on the part of the mortgagor and therefore the mortgagee in either case can sue for realisation of his dues by the sale of the mortgage property. Remedy by foreclosure is denied to both of them. In an English mortgage the property is transferred *absolutely* to the mortgagee ; but in a simple mortgage only the right of sale is transferred. An English mortgagee being the owner of the property has the right to enter into immediate possession of the property, but in a simple mortgage there is no such implication of ownership, nor the right to possession. An English mortgagee has in certain cases the right of sale without the inter-

vention of the Court, but a simple mortgagee has never any such right.

Explain the points of difference between a Mortgage by Conditional Sale and an English Mortgage. B. L. 1910 (Jan.) 1911 (Jan.) 1918 (Jan.) 1919 (July). 1926 (Jan.) 1930 (July) 1931 (Jan.) All. 1924 All. 1927 (Int.).

*** *Distinction between an English Mortgage and a Mortgage by Conditional Sale*; In an English mortgage there must be a *covenant* to repay or some personal liability on the part of the mortgagor; the property should be conveyed *absolutely* to the mortgagee subject to the *condition* of reconveyance on payment of the mortgage-money on a certain date. But in a mortgage by conditional sale there is no personal liability to pay; the sale is *ostensible*, *i.e.* not real or absolute, and is to be perfected into absolute sale on failure of the payment of mortgage-money on a certain date. "A conditonal sale is thus very much like an English mortgage by trustees under a power, where there is no *cestui que trust* to enter into the usual covenants" —Ghose's *Mortgage*, p. 81. In an English mortgage the ownership is wholly transferred to the creditor, which is, however liable to be divested by the repayment of the loan on the appointed day. In a conditional mortgage, the creditor acquires a qualified ownership which can ripen into an absolute one on the failure of the mortgage. So an English mortgagee has the right to enter into immediate possession of the property while a conditional mortgagee has necessarily no such right as the sale to him is merely ostensible or unreal. In an English mortgage the *absolute* conveyance may be converted into a mortgage while in the other the *ostensible* sale, *i.e.*, the mortgage is liable to be converted into an *absolute*

sale by foreclosure. See 2 Bom., 113 and 9 Cal., 234. The remedy of an English mortgagee is by sale, whereas that of a mortgagee by conditional sale is by foreclosure.

Define an equitable mortgage and show how it operates against a subsequent legal mortgage of same estate. B. L. (Int.) 1916 (July) 1930 (Nov.) All. 1921.

Mortgage by deposit of title deeds (Formerly called *Equitable Mortgage*): is the transaction whereby a person in the Presidency-towns and in certain other specified towns delivers, to his creditor, or the creditor's agents, documents of title to *immoveable* property with intent to create a security thereon.

The effect of this transaction is that a mortgage is created in favour of the creditor in respect of the properties covered by the title deeds. Formerly, the T. P. Act contained no definition of the term "mortgage by deposit of title-deed", otherwise called as *Equitable Mortgage.* Only in the proviso to sec. 59, it was said that the provision relating to registration of mortgages did not apply to mortgages created by deposit of title-deeds in the Presidency-towns of Calcutta, Madras and Bombay and in certain other towns. But the above definition has now been added by the amending Act of 1929. It does not introduce any change in the conception of an equitable mortgage but simply endorses the old juristic idea underlying the specific form of mortgage with this addition that the Governor-General in Council will have the power to extend by means of a notification* in the Gazette of India the application of this form of mortgages to other

* E.g. Notification dated 16-1-17 has extended the section to Bangalore, Cf. 35 C. W. N. 1061=54 C. L. J. 194, P. C.

places than the Presidency-towns and the other specified towns. At present this form of mortgage is in vogue in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab as also in Bangalore by virtue of a notification (see p. 203).

[*N.B.*—Title deeds do not include their copies, 54 C. L. J. 328]

What are legal and equitable mortgages in English Law? B. L. (Int.) 1921 (Jan.)

A mortgage by deposit of title deeds is ordinarily called an *equitable mortgage* on the analogy of a similar expression used under the English law. But the Indian law fundamentally differs from the English law. In England this form of Mortgage creates a mere equitable security as contrasted with an actual mortgage which is ordinarily called a legal mortgage, and is therefore unenforceable against a *bonafide* purchaser for value of the legal estate without notice. But here in India it creates not merely a right *in personam* but a right *in rem* which cannot be defeated by any defence of *bonafide* purchase without notice (see Ghose's Mortgage, 5th Ed., p. 173). Consequently, it will operate also against a subsequent legal mortgage of the same estate. In England this form of mortgage is justly called an *equitable* mortgage, but in this country, the latter expression is a misnomer, because here it is in fact a *legal* mortgage. We shall see hereafter that in respect of equitable mortgages as prevalent in England, the doctrine of consolidation of two mortgages, the principle of tacking or squeezing out the mesne incumbrancer are applied on various considertions of equity, but in

India all these considerations cannot apply and have accordingly been abolished.

Essentials of an equitable mortgage. Mad. 12, 13. All. 99, 06. Bom. 03.

An equitable mortgage may include lands outside the limits of the towns mentioned above.* But it should never be allowed unless it is made in any one of those towns. When an equitable mortgage was created by deposit of title-deeds relating to immoveable properties situate partly inside and partly outside the town of Calcutta as collateral security, Jenkins J. *held* that it was a valid mortgage.†

The two ingredients of an equitable mortgage are therefore as follows—(i) delivery of the title-deeds to the creditor or his agent; (ii) an intention to create a security on them. "Delivery" means delivery of actual possession as a result of the agreement. Besides, there must be an intention to create a security by the deposit, and the deposit must be supported by a debt. It is not necessary that all the title-deeds should be deposited (See Fisher *on Mortgages*). Writing is not necessary for recording the deposit, and if there be any memorandum at all for that purpose it need not be registered, so long as there is the necessary deposit, independently of the memorandum.‡ Sec. 59 of the Act distinctly states that no registered instrument is necessary for creating an equitable mortgage. In some cases prior to 1929

* *Varden* v. *Luckpathy*, 9 M. I. A. 307; *Behram* v. *Sorabji*, 38 Bom. 372.

† *Raja Srinath* v. *Godadhar Das*, 1 C. W. N. 225, s. c. 24 Cal. 34.

‡ *Esther Isac* v. *Marthu Mall*, 25 C. L. J. 160.

it was held that where the so-called memorandum was more than a mere memorandum, and embodied the mortgage contract, registration was necessary (1): Or, in other words, if the deposit and the bargain of the mortgage contract were intended to be evidenced by the memorandum, the same required registration, and without such registration it was inadmissible(2). But in view of the present wording of sec. 59, this seems to be scarcely tenable(3).

A subsequent registered mortgage does not acquire priority over equitable motgage by deposit of title-deeds. B. L. (Int.) 1919 (Jan.)

Certain incidents of an Equitable Mortgage :—(1) An equitable mortgage "is a complete act and not an executory agreement and prevails against the subsequent transferee who takes under a registered instrument" (Shephard and Brown). See also *Coggan* v. *Pogose*, 11 Cal., 158 followed in *Gokul Das* v. *Eastern Mortgage and Co.*, 33 Cal., 410, s. c. 4 C. L. J., 102. Sec. 48 of the Indian Registration Act now distinctly provides that such a mortgage prevails against a subsequent registered mortgage. Therefore, a subsequent mortgage should for his safety not only search the Registration office but also ask for the title-deeds. An *equitable* mortgage constitutes a "perfected pledge" creating a right *in rem*, and therefore, not liable to be defeated by a defence founded on purchase for value without notice. See Ghose's Mortgage, 5th Ed. p. 435. (2) This mortgage avails against all who are not *bona fide* purchasers for value without notice, *Ibid.* (3) The equitable mortgagee's remedy is by foreclosure or by a decree for sale. (4) The mortgagor's remedy is by a suit for redemption and not by an action in detenue to recover the title-deeds.

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(1) *Bhairab* v. *Anath Nath*, 24 C. W. N. 599.

(2) *Subramanian* v. *Latchman*, 50 I. A. 77=38 C. L. J. 41 (P. C.), Cf. 43 I. A. 122=24 C. L. J. 314 (P. C.). Cf. 47 Mad., 398; 60 M. L. J. 309.

(3) *Sundarachariar* v. *Narayana*, 58 I. A. 68=54 Mad., 257=53 C. L. J. 396=35 C. W. N. 494 (P. C.).

Anomalous Mortgage : An anomalous mortgage is a transaction which is in fact a mortgage (being a transfer of an interest in specific immoveable property for the purpose of securing the payments of debts, present or future, or for the performance of an obligation which may result in a pecuniary liability), but which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds. Shortly stated, an anomalous mortgage is a mortgage other than those categorically defined in the section.

This definition of the term "anomalous mortgage" has been added by the amending Act of 1929. The old section 98 contained a reference to such mortgages but the present definition gives the term a wider connotation than it had under said sec. 98, because formerly a transaction formed by the combination of simple and usufructuary mortgages or formed by the combination of a mortgage by conditional sale and usufructuary mortgage could not come under the denomination of anomalous mortgage, but now such combinations would amount to anomalous mortgages. Formerly, such combination mortgages were regulated by the rules of the component mortgages but now such combinations being anomalous mortgages, rights and liabilities under them will be regulated by the rule contained in sec. 98. Some of the anomalous mortgages may be mentioned as follows :—*Dristibandhak*, *Gahan Lahan*,

Peruartham, *Otti*, *Kanam*, etc. In fact, any mortgage that cannot be brought under any of the specified categories mentioned in the sec. 58 will be an anomalous mortgage.

Illustrations : (*a*) In an usufructuary mortgage, the mortgagor assumes a personal liability to pay the mortgage money; this is an anomalous mortgage entitling the mortgagee to sue on the personal covenant; (*b*) A mortgagee by conditional sale is given possession of the property and it is stipulated that he shall not be entitled to foreclose but will be entitled to put the property to sale if his dues are not paid off within a fixed time by the usufruct of the property; it is an anomalous mortgage to be regulated by the terms of the contract. Zuripeshgi leases are now virtually anomalous mortgages.

Sub-Mortgage : We have seen at p. 11, *ante*, that the mortgage debt is immoveable property. Therefore, a mortgagee can assign or can execute a mortgage in respect of his interest in the mortgaged property. A mortgage of the mortgagee's interest is called a sub-mortgage. A sub-mortgagee is entitled to a decree for sale of the mortgagee rights of his mortgagor* Such a sub-mortgagee if he wants to bind the original mortgagor must give a notice to him, because if the original mortgagor in ignorance of the sub-mortgagee, pays off the mortgagee, the sub-mortgagee shall not be entitled to hold him responsible. A payment by the original mortgagor to his mortgagee after notice of the sub-mortgage, however, does not bind the sub-mortgagee (†)

Recapitulation : All the forms of mortgages are transfers in the sense that they all pass (transfer) *specific interests* in property. Out of full ownership which rests with

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* *Ram Sankari* v. *Ganesh Prosad*, 29 All. 385 (406).

† *Narayana* v. *Raghavammal*, 18 M. L. J. 462, 463; also *Sahadev* v. *Sheikh Papa*, 29 Bom., 199.

the mortgagor some interest is taken out and given to the mortgagee. If ownership be represented (as is commonly done) as a bundle of rights, then we may say that by a mortgage some of the sticks of rights out of this bundle are taken out and transferred to the mortgagee. A simple mortgage gives the mortgagee the *right of sale*,—a component part of ownership. A usufructuary mortgage passes the right of *possession* and *enjoyment*. The other two mortgages pass *qualified interest* (as opposed to full ownership.) *e.g.*, an English mortgage gives the right of sale without the intervention of the Court.

Both immoveable and moveable properties can be the subject-matter of a mortgage. The T. P. Act is confined only to the mortgage of immoveable properties. As to the validity of a mortgage of moveable and non-existent property see pp. 189-90 (Ch. iv). A mortgage cannot be created unless the property mortgaged is *specifically* mentioned in the mortgage-deed, as in that case the whole transaction is vitiated by uncertainty. No particular form is necessary for the creation of a mortgage. Whether a transaction is a mortgage or not is to be determined by a reference to the intention of the parties. If the words of a deed are such as to create a security on a property the transaction will be a mortgage.

What are the respective rights of the mortgagees acc. to the T. P. Act? B. L. (Int.) 1921 (Jan.).

Sec. 59. Mortgage when to be by assurance and when not : Save in the case in which the principal sum secured is less than Rs. 100 and in the case of an Equitable Mortgage a mortgage can be effected *only* by a registered instrument signed by the mortgagor and attested by at least *two* witnesses. If the principal sum secured is less than Rs. 100, a mortgage may be effected either (1) by "a registered instrument" duly signed and attested, or (2) by delivery of possession of the property.

In what cases under T. P. Act can a mortgage be effected without a written instrument? B. L. 1911 (Jan.)

The words in quotation ("a registered instrument") have been substituted by Sec. 3 of Act vi of 1904, for the words "an instrument" which originally occurred in this section. The effect of this change is that even when the principal sum is less than Rs. 100, if any instrument is made at all it must be registered. So that unless the mortgage be made by delivery of possession (which can be done only when the principal sum is less than Rs. 100) it must be made by a *registered* instrument; or, in other words, *every instrument of mortgage must be registered.* Delivery of possession being out of the question in the case of a simple mortgage it can be made only by a registered document, no matter whether the principal sum secured be less than Rs. 100 or not. In this form of mortgage as the mortgagor does not part with possession, the mortgagee is likely to be very easily deceived if registration be not compulsory. The privilege conceded in favour of mortgage by deposit of title deeds exempting it from the law of registration facilitates the quick completion of business transactions in the specified commercial towns.

The effect of non-registration: An instrument required to be registered under sec. 59, if not duly attested and registered, will not create a valid mortgage; but it may be used to establish a personal liability; *Ulfatunnissa* v. *Hossein Khan*, 9 Cal., 520; also *Sanatun* v. *Dino*, 26 Cal., 222. Although a deed may be invalid for want of registration, if possession has been delivered under

it, the doctrine of Part Performance (s. 53 A) may be brought into play.

The effect of invalid attestation : Attestation and registration are formalities which have been imposed by law to guard against fraud and perjury; and that being the case, compliance with such formalities should be strictly enforced. So, where a mortgage-deed is not properly attested by *two* witnesses as aforesaid, the transaction cannot operate as a mortgage; see *Arjun* v. *Kailash*, 36 C. L. J. 373.

What do you mean by the word "attestation"? B. L. 1910 (Jan.) 1920 (July).

Signing and attestation : This section (Sec. 59) does not require that the mortgagor should sign personally; if the mortgagor is illiterate the writing of his name by a scribe is a sufficient signature; even the affixing of a mark may serve the purpose, Similarly, the attesting witness too, need not sign personally; but he must be present at the execution, no matter whether he signs himself or by proxy. As to what is meant by *attestation*, *vide* at p. 22, *ante*. "An attesting witness, is a person in whose presence the instrument is executed or its execution is acknowledged". The word *presence* involves two ideas, namely, *mental* cognition of the act and *physical* contiguity, 14 C. W. N. 964; 11 C. L. J. 563. This is the Calcutta High Court view; the views of the other High Courts are not consonant with it on this point. According to the Calcutta High Court rulings a scribe may be an attesting witness *; so if the name of the scribe appears on the mortgage-bond, one more witness will be sufficient to complete the statutory number of two. For a scribe to be an attesting witness, he must sign as a witness also; the deed must show that he has also purported to attest. A party to a deed cannot be an attesting witness, 11 C. L. J. 563. In the P. C. case of *Shamu Patter* v. *Andul*,

* *Jagannath* v. *Bajrang*, 48 Cal., 61.

35 Mad. 607, [16 C. L. J. 596] the word "attest" has been defined as "the witnessing of actual execution of the document by the person purporting to execute it"; so it has been maintained that where the attesting witnesses were not present at the time of execution of a document but had put their names on it on the acknowledgment of the executant the deed was not properly attested under this section, but now attestation on acknowledgment of execution by the *executant* is valid, but attestation on acknowledgment by executant's son wont do, see *Hira Bibi* v. *Ramhari*, 52 I. A. 362=42 C. L. J. 148 (P.C). Also 54 Mad. 163. Cf. 49 All., 25. (1). The requirement as to attestation contained in sec. 59 of the T. P. Act, is not complied with unless the attesting witnesses are able to swear both to the act of execution *either on the strength* of his *own personal knowledge* or on the strength of the executant's acknowledgment and the identity of the executant (2)

Will attestation of a deed fix the witness with notice of the contents of the deed? 1920 (July).

Attestation proves no more than that the signature of an executing party has been attached to a document in the presence or to the belief induced by acknowledgment, of a witness. It does not involve the witness in any knowledge of the contents of the deed, nor affect him with notice of its provisions (3). Consequently, it cannot operate as an estoppel against the witness with respect to the facts stated in the deed (4). A writer of a document cannot be looked upon as an attesting witness, unless he signs also as an attesting witness, 44 Bom., 405. Where an illiterate executant of a document executes it "by the pen of" the scribe the latter cannot be an attesting witness to the document, as he cannot attest his own writing (5). But if the illiterate

(1) See also *Ram Bahadur* v. *Ajadhya*, 20 C W. N. 699. (Pat.); *Girija Nandan* v. *Hanuman Das*, 49 All., 25 (F. B.)

(2) *Ganga Pershad* v. *Ishri Pershad*, 45 Cal., 748 (P. C.) [27 C. L. J., 548].

(3) *Nandalal* v. *Jagat Kishore*, 24 C. L J., 487 (P. C.); see also 42 Cal. 876. (P. C.); 21 C. L. J, 225. Cf. 42 C. L. J. 215

(4) *Panauaang* v. *Markandeya*, 26 C. W. N. 201 (P. C.)

(5) *Sristidhar* v *Rakhyakali*, 26 C. W. N. 264.

person puts his mark, his signature is complete, and the words' "by the pen of" after the mark will be a surplusage, and the writer of the executant's name can then attest the 'signature by mark'., *Govind Bhikari* v. *Bhau Gopal*, 41 Bom. 384. In the case of deeds executed by *pardanashin* ladies, if the witness, though he has not seen the lady's face, has been able to recognise her by her voice and been sure of her identity and has seen the hand move, that will be sufficient attestation. It is also sufficient if the witness has attested on her acknowldgment, her voice being known to him. An attestation on the acknowledgment of the son of the executing lady is not sufficient *. An endorsement by the sub-registrar of the *admission* of execution may be good attestation (see Q. 5, *infra*) provided the endorsement is made in the presence of the executant (See 52 Mad. 123; 60 M. L. J. 302).

Ram Kumari Bibi v. *Sri Nath Roy* (1 C. W. N. 81); in the case the only attesting witness to a mortgage-bond (while there ought to have been at least *two*) signed the instrument *before its execution* by the mortgagor, it was *held* that the bond was not attested as required by Sec. 59. T. P. Act, and was therefore invalid. This bond though it came within the definition of a mortgage under Sec. 58, being in contravention of Sec. 59 was held not to be within the definition of a charge as defined in Sec. 100 (see *infra*). Every defective and unenforceable mortgage is not to be regarded as a charge, 33 Cal. 915.

Q. 1. Two persons intended to execute a document. One alone executed it, and then the attestors attested. Then the document was taken to the second executant who signed it. Is the execution by the second party duly attested?—B. L. (Int.,) 1920 (July)—*Ans.*: No; see *Muniappa* v. *Velachamy*, (1918) M. W. N., 153, following *Shamu Patter's* case, 35 Mad., 607 (P. C).

Q. 2. A mortgage is executed in which one of the two

* *Hira Bibi* v. *Ram Hari*, 5 Pat. 58=30 C. W. N. 364=42 C. L. J. 148 (P. C.)

attesting witnesses signs on acknowledgment of the execution by the mortgagor. Is it a valid mortgage? What is the remedy of the mortgagee for realising his dues?—B. L. (Int.), 1921 (Jan.)—*Ans.*: An attestation on the strength of an acknowledgment of execution is now valid, provided there is no difficulty as to the identity of the executant.

Q. 3. At the time of execution of a mortgage deed the attesting witnesses were on one side of the *purdah* and the executant of the deed, a *pardanashin* lady on the other. The son of the lady took the deed behind the purdah returned with it bearing a signature purporting to be hers and said "It has been signed by my mother" and the witnesses thereupon attested. Give your opinion with reasons as to the validity of the mortgage assuming that the other formalities were properly observed. (Cal. 1928, July)—*Ans*: This is the case of *Hira Bibi* v. *Ramhari*. The witness did not see the lady sign; nor did they attest on the *personal acknowlegment* of the lady. Son's acknowledgment is nothing. So the deed was not properly attested.

Q. 4. A, an illiterate person, signed a deed by putting his mark on it. The mark was described by the scribe of the deed. The deed was attested by two independent witnesses. Subsequently the deed was sought to be proved by the testimony of one of the witnesses and the scribe. Was the deed duly proved? Discuss, (Cal. 1929, July),—*Ans*: See *Govind Bhikaji* v. *Bhau Gopal*, *supra*; also 7 C. W. N. 160 (161). The signature is complete by the mark and the scribe describing the mark simply authenticates the mark and therefore he becomes an attesting witness.

Q. 5. A person executes a mortgage deed which is properly attested by only one witness. The executant, however later on acknowledges his execution before the sub-registrar and the Sub-Registrar in due course signs his name on the instrument *in the presence of the mortgagor*. Is the deed properly attested; (Cal. 1931, Jan.)—*Ans*. Yes, see *Radhamohan* v. *Nripendra*, 47 C. L. J. 118 (*dist*, in 32 C. W. N. 1228). Cf. A. I. R. 1930 Cal. 750.

When mortgage is completed : A mortgage is complete as soon as the deed is registered. The fact that consideration has wholly or partly remained unpaid does not affect its completion, unless there is a contract to the contrary as there may be a mortgage for a *future* debt. Therefore, a subsequent transferee of the property cannot get red of the mortgage by saying that on the date of his transfer, consideration for the mortgage was not paid. Or, in other words, a subsequent transfer of a property will not prevail against a mortgage thereof registered on a prior date on the ground that the consideration for the mortgage was paid on a date subsequent to the transfer. Bnt a mortgage for which no consideration has ever been paid is however, invalid. In this respect a mortgage differs from a sale. A mortgage fails for want of consideration but a sale does not so fail. A vendor has a lien for the promised consideration but the promised consideration, for a mortgage cannot be recovered by a suit, *Vide under the next* heading.

Specific Performance of the Contract for Mortgage : Although a contract for sale can be specifically enforced, still it is not open to the parties to ask for specific perforance of a contract for mortgage, because the Court cannot possibly compel the parties either to lend money or to borrow money. Thus, it has been held that a suit by a mortgagor for the recovery of the balance of the mortgage money, being a suit for specific performance of the contract between the parties does not lie, *Shaik Galim* v. *Sadarijan Bibi*, 21 C. L. J. 532. A Court can however enforce the execution of the mortgage-deed if the mortgagor has already received consideration on promise of executing a mortgage deed. For a contract or agreement to mortgage, see generally, *Hukamchand* v. *Radha Kishen*, 34 C. W. N. 506=51 C. L. J. 581 (P. C.).

Sec. 59A : Unless otherwise expressly provided, references in this chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.

N.B.—This new section has been added in order to make it clear that the terms "mortgagor" and "mortgagee", as used in Chapter IV will include all persons deriving title from them respectively *except where they have expressly been mentioned* as not including such representatives For the significance of the words in italics, see secs. 91 and 92.

What is meant by the right to redeem a mortgage? B. L. 1911 (Jan.) 1919 (July).

Rights of the Mortgagor: (Secs. 60, 61, 62, 63 and 64)—

Sec. 60:—(1) *Right of Redemption*—*i.e.*, at any time after the principal money has become *due* and on payment or tender* of the mortgage money at a proper time and place, the mortgagor has the right to get back his property and demand—

(*a*) the return of the mortgage instrument together with all the title-deeds; that is, all the documents relating to the property, which he received in connection with the mortgage transaction.

(*b*) delivery of possession when the mortgagee is in possession, and

(*c*) a transfer of the property or acknowledgment in writing of the extinction of the mortgagee's right.

State precisely what is meant by the term "equity of

N.B.—Lit. "to redeem" means "to repurchase", *i.e.*, to say, to buy back the estate which has passed to the mortgagee because of the mortgage, This was the original sense of the phrase. And how the present technical meaning does

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* Tender or payment of the mortgage money is not a condition precedent to the institution of a suit for redemption of a mortgage. All that sec. 60 provides is a definition of the right of redemption; it does not lay down the conditions upon which a suit for redemption can be instituted and does not require that a tender of the mortgage money must be made prior to the beginning of the suit, see 43 All., 95 and 638.

follow from it is obvious. It will not be altogether out of place to mention here that the two terms "Right of Redemption" and "Equity of Redemption" though used as synonymous in India, are not exactly identical things under the English Law. Under the Common Law of England, the mortgagor's right to get back his 'estate' on payment of the debt before the stipulated date was designated as the Right of Redemption which was supposed to be lost on the mortgagor's failure to exercise the right within the specified time. Later on, this Common Law notion of the forfeiture of the mortgagor's right by default came to be looked upon more leniently by the Court of Chancery (the Equity Court of England) which maintained that after default, though the mortgagor lost his remedy at Common Law, his remedy in Equity remained unaffected; or, in other words, though his *Right* of Redemption was lost, still he had the *Equity* of Redemption. Our Courts do not recognise this distinction. But in one connection, if at all, the use of the expression may may be justified in this country. For example, where because of an agreement between the parties, the right of equity is severely clogged. Here equity interferes and says that notwithstanding the stipulation, the equity of redemption remains unimpaired and relieves the mortgagor of the clogs.

redemption". To what extent, if at all, is the use of the expression appropriate in connection with an Indian Mortgage? All. 1921.

(2) *Right to compel the mortgagee to* transfer to third persons. (sec. 60A.)

(3) Right to inspect title deeds (sec. 60B.)

(4) *Right to redeem* one of two properties separately mortgaged, *i.e.*, a right to avoid "consolidation" by the mortgagee of two separate mortgages. (sec. 61).

(5) *Usufructuary mortgagor's right to recover possession*: All the mortgagors have the right to redeem but the usufructuary mortgagor in particular has the right to recover possession. (sec. 62).

(6) *Right to get all the accessions* to his property during the continuance of the mortgage subject to the following rules :

(*d*) Where the accession is capable of separate enjoyment without detriment to the principal property—he should pay the expense of its acquisition to the mortgagee if he intends to take it.

(*e*) Where the accession is not capable of separate possession or enjoyment, and (*i*) the accession was necessary for the preservation of the property and was made with his assent he is bound to pay the cost thereof, (*ii*) but if the acquisition is voluntary the mortgagee cannot claim any expenses. (sec. 63).

(7) Has a similar right to all improvements, (sec. 63A).

(8) *Right to get the benefit* of the renewal of the lease by the mortgagee when such lease forms the subject-matter of the mortgage. (sec. 64).

(9) Right to grant leases (sec. 65A),.

N. B.—Of the above rights of the mortgagor, the right to redeem (ss. 60 & 62), the right to compel transfer to third party (s. 60A), the right to inspect documents (s. 60B) are indefeasible, that is, the mortgagor cannot contract himself out of it. The other rights are subject to contract between the parties and may be varied by mutual agreement.

Indicate accurately the nature of the 'right to redeem

The nature of the equity of Redemption :—Right to redeem is a natural incident of a mortgage. Notwithstanding any stipulation to

the contrary a mortgagor, at any time after the principal money has become payable and before his *Equity of Redemption* has been actually foreclosed, has, on payment of his debt, the right to get back his property free of all conditions or liens. This right of redeeming the mortgagor's property is an indefeasible right and cannot be taken away from him by any law or contract.* The law which has so often jealously permitted all modifications of legal relationships by agreement does not allow any person to contract himself out of his right of redemption. So that all stipulations tending to bar this right have been held to be invalid. A man cannot mortgage his property and cannot at the same time bind himself by an agreement that he will not have the right to redeem it. The protection which the law throws round the mortgagor might be rendered wholly illusory (as will appear from the case of *Salt* v. *Marquess of Northampton*, below) if the right to redeem could be limited by contract between the parties (Dr. Ghose). Mortgages are an exception to the maxim, *Modus et conventio vincunt legem* ("custom and the agreement of parties over-ride the law"). The incident attaching to a mortgage cannot be separated and taken away from it by mutual agreement of the parties. If the right of redemption could be detached and subtracted from a mortgage, the mortgage instead of being a security would become an absolute transfer; or, in other words, a mortgage would cease to be a

a mortgage'. B. L. 1912 (June). All. 1925.

* Cf, *Mohammad Sherkhan* v. *Seth Swami*, 35 C. L. J. 486 (P.C.)

mortgage. But that is contrary to the fundamental principles of law. In 2 Bom., 231 and 1 Bom. H. C., 199, it has been ruled that by one and the same deed an estate could not at one time be a mortgage and at another cease to be so. This principle has been again formulated in *Noakes & Co.* v. *Rice*, 1902, A. C., 24, which lays down that any provision, which prevents a mortgagor (who has paid his mortgage-debt with interest and costs) from getting back his property, is void. This rule is shortly expressed in the maxim* "Once a mortgage always a mortgage and nothing but a mortgage." In fact the law here exercises a sort of paternal jurisdiction against the mortgagor's own improvident act, by laying down that a mortgagor shall not have the right to contract himself out of his right to redeem, though this imperious intervention is an anomaly in a system which recognises the sanctity of contractual freedom and permits every adult person to ruin or to make a fool of, himself: "The true meaning of the rule is that a mortgage shall not be irredeemable or subject only to a limited right of redemption,

Explain and illustrate the maxim" once a mortgage always a mortgage. and nothing but a mortgage". B. L. (Int.) 1912 (Jan.) 1915 (Jan.) 1917 (Jan.) 1920 (Jan.) 1925 (July) 1926 (Jan.) 1928 (July). 1930 (July) 1932 (Jan.) All. 1925 (Ext.), 1927 (Int.)

Can a mortgagor contract himself out of his right to

* The T. P. Act does not contain any specific provision regarding this rule, because the Law Commissioners thought that, "it would be inexpedient to do more in respect of restrictions on redemption, than to give effect to the intention of the parties when it can be collected from the contract.' If this was really the intention of the Legislature, it has certainly not been carried out, for the rule, "Once a mortgage always a mortgage" has always been treated by our Courts with the greatest respect. It may, however, be said that whatever may have been the intention of the Legislature, sec. 60 of the T. P. Act, which provides that on repayment of the money advanced the mortgagee is to reconvey the mortgaged premises implies that the land is to be reconveyed, freed and discharged of all burden and liability arising out of the contract under which the advance was made.

so that the borrower may not forfeit his property if the debt is not punctually discharged"; Ghose's *Mortgage.* redeem B. L. (Int. 1930 (Nov.).

Salt v. Marquess of Northampton, 61 L. J. Ch. 49. The trustees of an insurance society made an advance on the security of reversionary interest, to which the mortgagor, was entitled in the event of his surviving his father. As part of the transaction, the trustees insured the life of mortgagor against the life of his father in the company of which they were the trustees ; and the premiums were paid by them till the death of the mortgagor, who executed a bond by which he charged the reversion with the principal of the money borrowed by him as well as the premiums, together with interest on both. There was also an agreement that in the event of the mortgagor paying the whole sum due before the death of his father, the trustees should assign the policy to the mortgagor, but if the mortgagor predeceased his father without paying the monies secured by the charge, the policy should belong to the trustees. The mortgagor however died in the lifetime of his father and never paid anything. The policy was for a larger sum than what was due to the mortgagees and the reprensentatives of the mortgagor claimed the surplus : *Held*, the stipulation of forfeiting the policy in favour of the trustees was a fetter on the right of redemption and that the mortgagor's representatives were entitled to the surplus.

The mortgage may be redeemed at any time after the principal money has become due* and on payment or tender of the mortgage-money at a proper time and place and before the mortgage is foreclosed under sec. 67, or the property is sold up and the sale is confirmed by a Court. But it must be borne in mind that this rule is subject to the statutory limitation which provides that When may a mortgage be redeemed? B. L. 1911 (Jan.).

* Formerly, we had the word *payable* instead of *due*.

the mortgagor must sue for redemption within 60 years. Cf. *Sayamali Molla* v. *Anisuddin*, 33 C. W. N. 1067 (F. B.).

When does the mortgage money become due?

When a date is fixed for repayment of the debt, the mortgage money *becomes due* only if that date has expired and as there is no right of redemption unless the mortgage money becomes *due*, the mortgagor cannot redeem before that date, though he may tender interest up to that date. "When time is the essence of the contract the mortgagor cannot redeem before the stipulated period," (*per* Mahmood J.) The mortgagee likewise cannot before that date sue for fereclosure. Thus, the rights of redemption and foreclosure are co-extensive. The Bombay High Court in *Vadyu* v. *Vadyu* (5 Bom. 22) following the authority of *Brown* v. *Cole* (14 Sim., 427) lays down that the mere fixation of a term for paying off the mortgage-debt is to be presumed *to be binding* upon the parties unless the contrary has clearly been intended. The Madras High Court however took a lenient view ; it held that when a date was fixed, the presumption was that it was fixed for the convenience of the debtor, so that he might repay the debt at an earlier date unless precluded by a definite stipulation contained in the mortgage deed preventing redemption before the appointed date*. This lenient view ignores the fact that it may be quite possible that a mortgagee relying on the condition in a mortgage regarding the time of

* *Raja Setrucherla* v. *Raja Vairicherla*, 2 Mad. 314 ; also 10 All., 602.

redemption may have entered into other transactions which may possibly be affected if the mortgage is redeemed before time. In 36 All. 195, P. C. the Judicial Committee laid down that redemption should be allowed within the term of the mortgage. Legislative recognition has now been given to this view by the use of the word "due" in the place of the old word "payable" making it clear that the right to redeem and that to foreclose are co-extensive and premature redemption is not permissible. The mortgagee cannot call in his mortgage money whenever he likes and the mortgagor cannot ask for redemption before his time. But this is so only in the absence of any stipulation, express or implied, to the contrary. But when the mortgagee has demanded money or has attempted to compel payment, the mortgagor can pay off the debt at an earlier date. The underlying principle of this is that the mortgagee, having disturbed the agreement which desired the continuance of the relationship between the parties up to the fixed time, has failed to do his part of of the contract and is not therefore entitled to ask the mortgagor to do his. But when does the mortgage money become due, if no term is fixed in the mortgage for repayment? The necessaay implication of the wording of this section is that the money becomes due the moment the mortgage transaction is completed and the parties need not wait eternally for redemption or foreclosure, though each party before enforcing his

Discuss the saying "the right to redeem and the right to foreclose are co-extensive? B. L. 1910 (Jan.)

right ought to give reasonable notice to the other. We have already seen that the right to redeem accrues after the principal money has become *due*. The right to foreclose, too, accrues from that date. Unless the money becomes *due* the mortgagor cannot insist on redeeming his property, nor can the mortgagee attempt to foreclose. Again, the right of redemption subsists until the mortgage is actually foreclosed, that is, till a decree absolute is passed in a foreclosure suit properly framed for the purpose, 25 C. L. J., 560, 563. So, generally these two rights accrue at the same time and subsist up to the same time and this incident is often described by the maxim, mentioned above, namely the rights of redemption and forclosure are co-extensive*. This maxim, however, does not universally hold good ; it is good only in the absence of any valid stipulation, express or implied, to the contrary. A contract for premature redemption is quite valid, but there can be no contract for foreclosure before the accrual of the right of redemption. Though the mortgagor cannot contract himself out of his right to redeem, he may by an agreement bind himself that his right of redemption be postponed for a certain period, even after the *due* date. In such a case the right of foreclosure is automatically postponed till the time of redemption comes. A usufructuary mortgagee cannot either foreclose or sell ; he is simply to maintain

* "Foreclose" is virtually used here in the broad sense of debarring the mortgager of his right of redemption whether by a decree for forclosure or by judicial sale or by private sale in the case contemplated in Sec. 69.

possession of the property till redemption or till redemption becomes barred by 60 years' rule of limitation.

One word here as to when the interest on the principal money becomes due. It becomes due at stated periods in accordance with the terms of the mortgage and may be recovered accordingly; but a suit for interest only if the principal money has also become due will be fatal for a subsequent suit for the principal money by reason of Or. 11, r. 2 of the C. P. Code, See 49 I. A. 9= 44 All. 121 = 35 C. L. J. 126—followed in 38 C. L. J. 126=27 C. W. N. 802 (P. C.)

Right of redemption is immoveable property.

Again, an equity of redemption is "property" within the meaning of sec. 6 and "a specific immoveable property" within the meaning of Section 58. In *Kanti* v. *Kutubuddin* (22 Cal., 33). Ghose and Gordon, JJ. observed that "immoveable property includes the rights of the mortgagor in the property mortgaged, or, in other words, his *equity of redemption* in that property." So what is mortgaged in a second mortgage is the equity of redemption which remains with the mortgagor after the first mortgage.

Indivisibility of the right of redemption.

Again the right of redemption is an *indivisible* jural object.* The mortgage-property is a security in its entirety, so if it is to be redeemed it is to be redeemed as a whole or not at all. One of the several mortgagors cannot come and redeem his share of the mortgage-property by paying a pro-

* *Motilal Jadav* v. *Samal Bechar*, 54 Bom. 625.

portionate amount of the mortgage debt. Likewise, when there are several mortgagees without any specification of their respective interests in the mortgage deed, they all hold the security as tenants-in-common and the mortgagor cannot propose to redeem any of them individually by separately paying off his share of the debt.* A person having the right to redeem is entitled to redeem the whole : it is no answer for him to say that he is interested in only one of the several mortgaged properties. The mortgagee can always insist that the whole of the mortgaged estate shall be redeemed together (2 Mad., 223). This indivisible character of the right of redemption is not destroyed if a part of the mortgaged estate is sold for revenue or if the mortgagee allows the mortgagor to release a portion of the property by paying a proportionate part of the mortgage debt. The mortgagee can *always* refuse acceptance of the mortgage-money piece-meal and disallow proportionate redemption. This law is for the benefit of the mortgagee who is thereby saved from a multiplicity of suits. In this connection the Judicial Committee have thus observed in *Nilkanta* v. *Suresh Chandra,* 12 Cal., 414—

"It is quite a new thing to hold that the purchaser of a single fragment of the Equity of Redemption may come without bringing the other purchaser into Court, and have an account as between himself and the mortgagee alone, so that the mortgagee may be paid off piece-meal ; such a law would result in great injustice to the mortgagee. It would

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* *Sunitibala* v. *Dhara Sundari,* 47 Cal., 175 (P. C.).

put him to a separate suit against each of them. Different portions of value might be struck in different suits, and the utmost confusion and embarrassment would be caused."

But the *proviso* to Sec. 60 mentions a solitary exception to this rule. When a mortgagee acquires in whole or in part the share of a mortgagor, the indivisible character of the right of redemption is destroyed, as otherwise the burden of the remaining mortgagors will be considerably increased. Thus, B, C, D are three mortgagors : A, being the mortgagee, purchases B's share ; here the indivisible character of the mortgage is destroyed and each of C and D will be allowed to redeem his share. But there is a further limit in the proviso. The acquisition of a mortgagor's share must be by *all* the mortgagees jointly when there are more mortgagees than one. Unless all the mortgagees join there will be no complete merger with respect to the share of that mortgagor. The integrity of the mortgage breaks up because if even upon the merger of a mortgagor's right, another mortgagor be compelled to pay the whole mortgage-debt, the mortgagee himself will be liable to contribution which will give rise to a second suit while under the present proviso one suit is sufficient.* But this principle will not apply if *all* the mortgagees do not join in the acquisition as in that case some of the mortgagees will not be liable to contribution and the difficulty which could be easily obviated in the case of a complete merger by application of this principle stands out unsolved as

When is a person interested in a share only of the mortgaged property entitled to redeem his own share on payment of a proportionate part of the mortgage money? B. L. 1898.

* *Kullan* v. *Mordam*, 28 All., 115 ; see also 31 All., 335.

ever.* The *proviso* has now been amended by the insertion of the word *only* to make it clear that the *only* case when integrity of a mortgage may be allowed to be broken, *apart from special arrangement*, is when a mortgagee acquires a share in the mortgaged property. In *Mayashan Kar* v. *Burjorji*, 27 Bom. L. R. 1449, the Bombay High Court held that a release of a portion of the mortgage properties by the mortgagee operated as a disintegration of the mortgage warranting piecemeal redemption by a fractional mortgagor on payment of proportionate amount. The effect of the above amendment is to supersede this decision. The ruling in *Hakim Lal* v. *Ram Lal*, 6 C. L. J. 46 allowing piecemeal redemption upon release by the mortgagee of the interest of one of the joint mortgagors is also no longer good law.

When may the redemption of a part of the mortgaged property be allowed? B. L. (Int.) 1925 (Jan.).

We have seen that when the integrity of the mortgage is split up because of the mortgagee's acquiring the interest of one of the mortgagors, another co-mortgagor *can* redeem his share piecemeal. But this right has a corresponding obligation, namely, upon such splitting up a co-mortgagor is not entitled to redeem more than his share. Thus, A, B and C mortgage their property jointly to D. A sells his $\frac{1}{3}$rd share in the property to D, the mortgagee. C, thereupon sues to redeem the remaining $\frac{2}{3}$rds share impleading B as a defendant.

* In the converse position when one of the co-mortgagors purchases the mortgagee's interest, the rest the co-mortgagors do not become entitled to apportion their debt, *Jagabandhu* v. *Haladhar*, 27 C. L. J., 110.

Here D can plead that C is not entitled to redeem more than his ⅓rd share (All. 1925). The integrity of the mortgage can, no doubt, be destroyed by special arrangement between, or mutual consent of, the parties. The mortgagee may so contract with the mortgagors that he will receive proportionate payments of the debt from the latter. The case of purchase or acquisition of a mortgagor's interest by the mortgagee resulting in piecemeal redemption by the fractional mortgagors has already been noticed above. It is however worth our while to remember that the purchase of a portion of the mortgaged property by the mortgagee, though it destroys the indivisible nature of the mortgage-debt to a *certain* extent does not *absolutely* destroy the indivisibility so as to let in any and every interested person to redeem. The following questions will illustrate this point.

Can there be redemption of a portion of mortgaged property? If so, under what circumstances? B. L. (Int.) 1929 (July). —No, except in the case contemplated in proviso to sec. 60.

Indivisibility not destroyed absolutely.

Q. 1. Two brothers A and B mortgaged their properties to C. A died leaving three sons, D, E and F. B sold his interest in the equity of redemption to C. Can D redeem his share of the mortgaged properties without offering to redeem the shares of E and F? Give reasons. B. L. (Int.) 1917 (Jan.)—Here the indivisibility is not absolutely destroyed; so, D cannot redeem his share alone.

Q. 2. Several properties are mortgaged by A to B; One property is released by B and A assigns the remaining properties to C.—Can C, the assignee, redeem these properties piece-meal?—No.

Q. 3. A mortgaged two houses to B for Rs. 200. C purchased at a Court sale A's interest in one of the houses and sold it to P. P sued to redeem the house and prayed

that the mortgagee be ordered to convey it to her on payment of Rs. 100. Can P succeed? Discuss—[Cal. 1929 (July)]: *Ans*: No.

Inu Khan v. *Naimuddin Sircar*, 3 C. L. J. 379: The mortgagee purchased the half share of one of the two mortgagors. He then brought a suit for foreclosure in order to obtain the share of the other mortgagor. *Held*, where a person interested in a share only of a mortgaged property may redeem his *own share only* on the mortgagee's purchasing the mortgagor's share, the mortgagee too in his turn may equally foreclose over such a share.

Condition for notice previous to redemption when valid: A provision in the mortgage deed to the effect that if the date fixed for payment of the principal money has been allowed to pass or no such date has been fixed, the mortgagor shall give to the mortgagee previous notice of redemption by payment or tender, is perfectly valid.

What do you understand by a "clog on equity of redemption? B. L. (Int.). 1930 (July).
There should be no "Clog on the Equity of Redemption". B. L. 1914 (Jan.) All. 1922, 1923, 1925.
A condition *absolutely* fettering the right of Redemption is a Clog.

Clogs on the Equity of redemption: The restrictive covenants which tend to defeat the right of redemption or to fetter it to the prejudice of the mortgagor are said to be "clogs" on the equity of redemption. Now, it is necessary that the right of redemption which is a natural idcident of mortgage indefeasible by any contract between the parties should have no such "clogs" on it as take away from its absolute and unconditional character. Remember that redemption is a *right* of the mortgagor and is not merely a favour shown to him by the mortgagee, which the latter can vary at his sweet will. Therefore, the law enjoins that "the property which comes back to the mortgagor on redemption must not be worse than what it was when it was mortgaged, and the mortgagee

must not either expressly or by implication reserve to himself any hold upon the property after the time for redemption has arrived and the right of redemption has been put in force", per Rigby L. J. in *Noakes & Co.* v. *Rice*, 1902, A. C. 24= 2 Ch. 445. In this case, one Mr. Rice mortgaged his premises to N. & Co., brewers, with a condition that Rice should not, whether during the continuance of the mortgage or afterwards, sell on the premises any other liquors than those prepared by the company. Such a condition was held to be a clog. Similarly, a condition that the mortgagee shall permanently remain in possession of the mortgaged property as a perpetual tenant at a fixed rent or otherwise (Cal 1923, July) is a clog inasmuch as the mortgagor will remain under an obligation even after redemption. But when such a clog is a part and parcel of the principal obligation it is perfectly good unless it is of an unconscionable character. (*Stanley* v. *Wilde*, 2 Ch. 474—see Snell's Equity, 15th Ed., p. 263). Thus, though the condition that the mortgagor will not have any right of redemption is invalid, a condition restricting the exercise of this right for a certain number of years is valid. A collateral advantage secured to the mortgagee by the mortgagor during the *subsistence of the mortgage* may be valid. In the above case, for instance, the restriction on Mr. Rice is valid during the *continuance* of the mortgage, though he will be at liberty to sell any liquor whatsoever after the mortgage has been paid off. A right of pre-emption given to the mortgagee in

Discuss the rule against a clog or fetter on the equity of redemption.

State clearly what was laid down in the case of *Noakes* v. *Rice*.
B. L. (Int.) 1913 (Jan.) 1914 (Jan.) 1918 (Aug.) 1921 (July) 1923 (Jan.) 1925 (Jan.) 1928 (Jan.).

A condition which is a part of the obligation itself is no clog.

A collateral advantage secured to the mortgagee is no clog.

case the mortgagor should proceed to a sale of the mortgaged property is valid as it does not interfere with the right of alienation, *Orby* v. *Trigg*, (1722) 9 Mod. 2 ; also 2 C. W. N. 575. But these restrictive covenants should have no force *after* the termination of the mortgage, and the mortgagor on redemption will be absolutely free of them. A stipulation in the mortgage-deed that only the mortgagor (and not his heirs or assigns) should be entitled to redeem has been held to be a clog as it has a tendency to defeat the Equity of Redemption ; so, a purchaser from the mortgagor can redeem, 3 All., 369. Similarly, a stipulation that the mortgagor failing to redeem must sell the property to the mortgagee at a fixed price or that the mortgagor failing to redeem within a certain time, the property is to vest in the mortgagee, is a clog inasmuch as it fetters the right of redemption or alienation [24 Mad., 449 ; *Mehr Ban* v. *Makhna*, 57 I. A. 168=34 C. W. N. 529, P. C.]. A condition that the mortgagor must pay off his *other* debts before claiming redemption, is likewise a clog, 9 Bom. 236 ; 9 C. W. N. 789. A condition that the mortgagor must not sell the property, but should redeem the property *only* with money out of his pocket is a clog as it tends to render redemption impossible.

Explain the principle relating to "clog on the equity of Redemption," and point out the extent of its applicability in the light of recent decisions. Mad. 1915.

Discuss the validity of a stipulation in a mortgage deed for a collateral advantage to mortgagee

The tendency of modern decisions is to recognise the contractual freedom of persons, and consequently the rule against clogging the equity of redemption is gradually losing sympathy. Sir F. Pollock, for example, maintains that the doctrine

of "clogging", though useful enough in a primitive age (when ignorant people were often entrapped into oppressive bargains) is an anachronism in our day. The rule should have become extinct, but law is a conglomeration of the relics of old technicalities. It has thus escaped annihilation, though it has since undergone considerable modification. It is now settled law that a stipulation in the mortgage deed for a collateral advantage will be valid provided it is neither, (i) unfair and unconscionable, nor, (ii) in the nature of a penalty clogging the equity of redemption, nor, (iii) inconsistent with or repugnant to the contractual and equitable right to redeem ; read *G. & C. Kreglinger* v. *New Patagonia M. & C. S. Co.*, (1914) A. C. 25=83 L. J. Ch. 78. (All. 1926, Ext.).

to endure beyond redemption. Under what circumstances will such a stipulation be valid ? B. L. (Int.) 1914 (July).

How has *Noakes* v. *Rice* been modified by *Kreglinger's* case ? B. L. (Int.) 1927 (Jan.)

Ex. 1. A mortgagor's right to redeem was by a covenant in the bond, stated to be exercisable only during his lifetime, unless he survived his father without paying off the mortgage. Are the representatives of the deceased mortgagor entitled to redeem ? B. L. (Int.), 1915 (July). *Ans.* Yes ; *Salt* v. *Marquess of Northampton*, p. 221, *ante*.

Ex. 2. Certain shares of a tea company were mortgaged to A with a condition that A should have thereafter the exclusive right of selling the company's tea as its broker. But after repayment of the mortgage the company changed its broker, and A sought to enforce the agreement ; *held*, it was a fetter on redemption ; *Bradley* v. *Carritt*, (1903) A. C., 253.

Ex. 3. A mortgage deed provided that if the mortgage money was not paid at a certain time, the right of the mortgagor to redeem would be suspended for a further fixed period ; *held* that the condition was a clog and therefore not

operative, *Mmd. Sher Khan* v. *Seth Swami.* 44 All., 185=35 C. L. J., 468 (P. C.)

Ex. 4. Where subsequent to the execution of a mortgage, the mortgagor executed a permanent lease in favonr of the mortgagee with terms disadvantageous to the mortgagor ; *held* the permanent lease was a clog, *Parashram* v. *Lakshmi Bai*, 53 Bom., 360.

Q. 1. Whether the following conditions are clogs : (*a*) that redemption should be postponed till all the debts due from the mortgagor to the mortgagee were paid off, (*b*) that the mortgagor should not alienate the property during the mortgage. [Cal. 1923, July.]—*Ans.* : (*a*) clog ; (*b*) clog ; see p. 232.

Q. 2. A mortgagee-deed contains a stipulation by the mortgagor whereby the mortgagee is granted a right of pre-emption over the mortgaged property. Is the stipulation enforceable ? [All. 1922].—A stipulation for pre-emption may be valid during the subsistence of the mortgage, but not after redemption. [See pp. 231-32].

Q. 3. If a mortgagor agrees with the mortgagee that he will not redeem for 25 years, is such an agreement valid ? (All. 1923).—*Ans.* : Yes ; the right of redemption may be deferred for a number of years ; see p. 231.

Q. 4. If the mortgagor agrees not to pay off the mortgage debt without paying off another debt contracted earlier on the security of the same property, is such a contract valid ? (All. 1923).—*Ans.* It is a clog, see p. 232.

Is there any rule of law which prohibits a borrower agreeing to deal with the mortgaged property as he likes after making of mortgage ? B. L. (Int.) 1915 (July).

The rule against the fettering of the right of redemption must not however lead to an inference that the parties to a mortgage cannot deal with the equity of redemption as they like. After the mortgage has been made, it is quite open to the mortgagor to sell or otherwise transfer his right of redemption to the mortgagee, though such transactions may not always be viewed with favour by

the Court of Equity as having possibly resulted from the mortgagee's abuse of his powers over his debtor. So, unless it be shown that the mortgagee has availed himself of his position as such to procure some facility or advantage leading to his purchase or connected with it, he is precisely in the same position as a stranger purchaser, *Raja Kishen Dutta* v. *Raja Mumtaz*, 5 Cal., 198. Likewise, it has been held in a recent case, (per Mookherjī J.), that "A mortgagee can purchase an equity of redemption at a sale held in execution of a money-decree obtained by a stranger against the mortgagor. He does not hold the equity of redemption as a trustee for the mortgagor and for his benefit."*

Q. 1. What is a clog on the equity of redemption? Take any one of the following conditions and discuss whether it is a clog on the equity of redemption : (*a*) a condition that the mortgagee should notwithstanding redemption remain in possession as a perpetual tenant at a fixed rent; (*b*) that redemption should be postponed till all debts due from the mortgagor to the mortgagee were paid off ; (*c*) that the mortgagor should not alienate the properties during mortgage, (*d*) that during the continuance of the mortgage whether any money should, or should not, be owing on the security the mortgagor is not to sell in the house any malt liquors except those purchased form the mortgagee, (C. U. 1929, July] :—*Ans*. (*a*) clog, see Ex 4 at p. 234 ; (*b*) clog ; (*c*) clog ; (*d*) no clog, *vide ante*.

Q. 2. A borrows Rs. 5,000 from B on a mortgage of his house. One year after the execution of the mortgage A agrees to sell his right to redeem to B, the lender. Is such an agreement valid ?—B. L. (Int.), 1915 (July) :—Yes, valid.

* *Bharat Ramanuj* v. *Ishan Chandra*, 27 C. L. J., 431.

Paymenet or tender of mortgage-money—may be made by the mortgagor himself or by his duly constituted agent. Tender or payment must be with respect to the whole of the mortgage-money, otherwise he will not be able to avail himself of his right of redemption. The receipt of payment need not be registered in order to make it admissible in evidence under sec. 92, proviso (4) of the Evidence Act, the principle of law that a document aiming at supersession of a registered document must itself be registered not applying to the case, Cf. Sec. 17 of the Ind. Registration Act.

How may the right of redemption be extinguished, and when? 1915 (July).

N. B.—The right of redemption may be extinguished: (1) By an act of the parties: (2) By an order of Court. For example, the mortgagor may sell his equity of redemption and thereby extinguish his said right; or when a decree is passed in a foreclosure suit or when the mortgaged property is sold by an order of the Court the mortgagor's right is lost. In a Bombay case* it has been held that the right to redeem is not extinguished by the dismissal for default of a redemption suit.

Obligation to transfer to third party instead of retransference to mortgagor.

Sec. 60A. (1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any

* *Shridhar* v. *Ganu*, 52 Bom. 111 (Much can be said against the view taken in this case).

encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall pre-prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.

Obligation to transfer to third party instead of re-transference to mortgagor : A mortgagor entitled to redemption and further entitled by the terms of the mortgage to a re-transfer of the mortgaged property upon redemption, can, at his option, require the mortgagee to assign the mortgage-debt and transfer the mortgaged property to a third person nominated by him. This provision enables a mortgagor in difficulties to find out a financier to save him from the hands of the mortgagee who would but for the financier's intervention take the mortgagor at a great disadvantage. The mortgagor may get adequate help from the financier by making him his nominee.

Under sub-sec. (2) this option can be exercised by a mesne encumbrancer just like the mortgagor himself and the fact that there is a puisne encumbrancer interervening does not stand in the way of the exercise of the said option. Sub-sec. (2) further provides that the option of requisition of any encumbrancer prevails over the like option of the mortgagor and in case of competition between different encumbrancers to make the

requisitition, their priority in point of time determines the superioity of their respective claims.

The most important requisites of the section are that (i) there must be subsisting right of redemption, (ii) there must be a distinct stipulation that on the fulfilment of certain conditions there should be right to require a re-transfer. Unlesss these two conditions are fulfilled the section will have no application.

Sub-sec. (3) of this section is rather important; it renders the provisions of this section inapplicable to the case of a mortgagee *who is* or *has been* in possession.

Right to inspection and production of documents.

Sec. 60B. A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.

Mortgagor's right to inspect and take copies from his documents of title in mortgagee's possession : This section gives the mortgagor, whose equity of redemption is still in tact, a right to inspect, and take copies from, his documents of title which were made over to the mortgagee at the time of the mortgage. The natural inconvenience of one's title-deeds remaining with another person is obvious; and the present section is intended to remove that inconvenience. The right of inspecting or taking copies subsists so

long as the right of redemption is alive. Where a mortgagor has lost his right of redemption by limitation or by transfer of his interest, there is no right of inspection or of taking copies under this section. Such right can be exercised only at *reasonable* times. If the mortgagor asks for inspection or for copies at an inopportune moment, or too frequently, the mortgagee will have the right to refuse him his prayer. The necessary costs or expenses of inspection or of copies will have to be borne by the mortgagor.

English Doctrine of Consolidation. "If the owner of different estates mortgage them to one person separately for distinct debts, or successively to secure the same debt, or the same debt with further advances, the mortgagee, so long as both the securities exist, may insist that one security shall not be redeemed alone upon the principle that, redemption being an equitable right, the person who redeems must on his part do equity towards the mortgagee and redeem him entirely not taking one of his securities, and leaving him exposed to the sisk of deficiency as to the other"—Fisher on Mortgages, p. 597. This was the law before the passing of the Conveyancing Act of 1881.

Sec. 61 : A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

Right to redeem separately or simultaneously.

Rule against consolidation of Mortgages : By *consolidation* of mortgages is meant the mortgagee's power to compel the mortgagor to

redeem together all the securities in his hands, or to prevent the mortgagor from redeeming one of such securities without redeeming the others. As such consolidation may cause considerable hardship to the mortgagor, this section abolishes it by providing that a mortgagor, who has executed several mortgages in favour of the same mortgagee, may redeem one or more of such mortgages when they become due, without redeeming the other mortgages. If there are several mortgages between the parties, the mortgagor can redeem them separately or simultaneously according to his convenience. The section contains no reference to the property which has been mortgaged, so it will not make any difference whether the different mortgages are on the *same* property or on *different* properties or on different *portions* of the same property. In *Ramaryanimgar* v. *Maharaja Giri*, 50 Mad., 180 : 45 C. L. J. 395. P. C., the Judicial Committee held that several mortgages on the *same* property could be consolidated if the parties were the same and there was no contract to the contrary. The amendment now effected has in substance overruled this P. C. case. If one of two mortgages existing on a property is redeemed, no prejudice is caused to the mortgagee, because by such redemption his security is not rendered insufficient, but on the other hand, it is enhanced, because the property which was formerly a security for *two* mortgages becomes after redemption a security for *one* mortgage only.*

* *Tajjo Bibi* v. *Bhagwan Prasad*, 16 All. 295 ; see also 27 All. 313 ; 38 Cal. 60=13 C. L. J. 21

One most important condition of the section is that it applies only in the absence of a contract to the contrary. So, the parties can agree that all the different mortgages should be redeemed together.(1) A covenant for consolidation may be contained in the first or in a subsequent deed.

Problem : A is liable to B for several debts. For one of these debts he mortgages his property to B, agreeing at the same time that he will not be entitled to redeem unless he pays off all the debts. This agreement takes the case out of the salutary provisions of Sec. 61. Therefore, all the debts have to be paid before redemption. Notice that Sec. 61 is subject to contract between the parties. Cf : 33 All., 393.

Consolidation of secured and unsecured debts : This section contemplates two *secured* debts, and therefore will not apply to the case where an unsecured debt is sought to be consolidated with a secured one. The latter case will be regulated by general principles. A covenant for the consolidation of an unsecured debt and a prior mortgage debt will not be enforced as it amounts to a clog on the equity of redemption under the mortgage(2) and the P. C. case of *Aditya Prasad* v. *Ramratan*(3) does not lay down a contrary proposition because in this P. C. case the mortgage was with possession and the second debt also created a lien on the property. Where, however an

(1) 37 All. 634. Ct. *Aditya Prasad* v. *Lala Ramratan*, 57 I. A. 173=52 C. L. J. 49=123 I. C. 191, P. C.

(2) *Rugad Singh* v. *Sat Narain*, 27 All. 178 (181) ; *Sheo Shankar* v. *Parma Mahton*, 26 All. 559 (560) ; *Durga Pershad* v. *Dukhi Roy*, 9 C. W. N. 789.

(3) 57 I. A. 173=5 Luck. 365=52 C. L. J. 49=123 I. C. 191 (P. C.)

unsecured debt was taken first and then a mortgage was taken and it was stipulated in the mortgage bond that the mortgage should not be redeemed without repayment of the previous debt, the stipulation is valid as its effect was to create a charge of the previous simple debt as well.* Therefore, the position is this that when the stipulation for payment of an unsecured debt constitutes a clog on the right of redeeming the secured debt, it is invalid ; but if the stipulation creates a lien for the unsecured debt also and provides for simultaneous discharge of both the liens, it will be valid. In this connection read also the notes under 'tacking'.

Right of usufructuary mortgagor to recover possession

Sec. 62. A usufructuary mortgagor has a right to recover possession of the property *together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee*† :—

(*a*) when the *mortgage money* was arranged to be paid out of the rents and profits of the property and it has been paid ;

(*b*) when the arrangement was that a portion of the mortgage money was to be paid out of the rents and profits and when the principal sum or the balance thereof has been paid or tendered or been deposited in Court, after it has become due.

It should be noted that the usufructuary mortgagor has

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* 46 I. C. 80; 50 I. C. 897 ; 64 I. C. 83.

† The words in italics are new and serve to bring the section into line with sec. 60 under which the mortgagor has a right to require the mortgagee to deliver back the title deeds and other documents relating to the mortgaged property.

the right to recover possession of the property *only* in the two cases contemplated by this section. Therefore, (1) where the mortgage-money is to be discharged out of the profits of the property and when part of it has been paid up leaving a balance outsanding, the mortgagor cannot sue for possession on payment of the balance still due. Again, (2) where the agreement was that the rents and profits of the property were to be appropriated in payment of a part of the mortgage money, *i.e.*, in payment of either interest in part or principal in part or both in part, the mortgagor would be entitled to recover possession on paying or tendering the balance of dues In the case contemplated in cl. (*a*), *i.e.*, where the agreement is that the mortgage money is to be paid *wholly* from the profits, the mortgagor cannot redeem by cash payment of the balance of dues. A stipulation that an usufructuary mortgagee will be entitled to retain possession of the property even after discharge of the mortgage debt is invalid.*

The Law of Accessions to Mortgaged property : *Accession* "primarily denotes physical accretions or additions whether brought about by *natural or artificial* means" (Shephard and Brown). Acquisition of outstanding interest may also be regarded as accession ; for instance, a lessee purchases the leased property, so a new interest is acquired, or in other words, his interest is enlarged. This acquisition or enlargement will be an accession. Natural accession may be illustrated by alluvion ; artificial accession is one acquired by human exertions ; erection of building is an instance of artificial accession (see Ills. to sec. 70).

B. L. 1909, 1910, 1914 (July). Mad. 1885, All. 1925.

The common rule of law is that an accession to the mortgage-property enures to the benefit of the mortgagee and his security (sec. 70) and at

What are the rights of the mortgagor and the mortgagee as

* *Ankinedu v. Subbiah*, 35 Mad., 744.

to accessions to mortgaged property? B. L. (Int.) 1922 (July). Mad. 1915.

the same time is subject to redemption (secs. 63 and 64) no matter whether it is the mortgagor or the mortgagee that makes the accessions. But this is subject to slight modifications in matters of details. All *natural* accessions and those acquired by the mortgagor go with the property and ultimately belong to the mortgagor; but *artificial* accessions if made by the mortgagee sometimes belong to the mortgagee and sometimes not, and sec. 63 makes provision for adjustment of the rights of the parties. The general principle is that mortgageee should not *voluntarily* add to the burden of redemption and that he can retain the fruits of his exertions only if separately enjoyable and if the mortgagor refuses to pay him his cost of acquisition. There is a distinction between cases where an accession is capable of separate possession and where it is not. In the former case the mortgagor can claim it only on payment of full cost of acquisition. In the latter case, the mortgagor is bound to pay the cost of accession only if it was necessary for the preservation of the property. It should be noted that the mortgagor is entitled to get all accessions if he is willing to pay and that a non-separable accession compulsorily made, he is bound to take on payment of the cost of acquisition thereof; but he need not make any payment either for natural accessions or non-separable voluntary accessions.

Law of Accessions ana ysed.

Sec. 63. The Law of Accessions as embodied in Sec. 63 may be analysed as follows :—

(1) Where the accession is capable of separate

enjoyment without detriment to the principal property and if it has been acquired at the expense of the mortgagee, the mortgagor desiring to take the accession must pay the expense of its acquisition. The mortgagor, if he so desires, may refuse to take the accession.

(2) Where separate possession or enjoyment of it is impossible, but the accession was necessary to preserve the property from destruction, or forfeiture, or if the accession has been made with the mortgagor's assent, the mortgagor is bound to pay the cost of the acquisition, as an addition to the principal money with interest at the same rate as is payable on the principal, or where no such rate is fixed, at the rate of 9 p. c. p. a.

(3) Where separate possession or enjoyment is impossible and at the same time the acquisition was voluntary, the mortgagee cannot claim any expense.

Ex. 1. A mortgages to B a field the trees on which are Government property. B buys the trees as occupant of the land. On redemption A may, if he so desires, take the trees on payment of B's costs; (*Bakshiram* v. *Darku*, 10 B. H. C. 69).

Ex. 2. A mortgages to B a field on which there are no trees; afterwards B voluntarily plants trees upon it. On redemption A is entitled to the trees but not bound to pay cost thereof. See 43 All., 638.

N B. The case of trees may fall under sec. 63A also, but that makes no difference in principle.

(4) When the mortgage is a usufructuary one, and the accession has been acquired at the expense of the mortgagee, the profits arising from the

aecession shall, in the absence of a contract to the contrary, be set off against any interest payable on the money expended as cost of acquisition.

Discuss if a house erected on the property after mortgage is an accession under the Act. B. L. (Int.) 1916 (Jan.)

This section seems not to have well provided for the case where the mortgagee voluntarily erects a building (not capable of separate possession or enjoyment) on the mortgaged land. Here the mortgagee is left entirely at the mercy of the Court of Equity, and is to be dealt with according to the circumstances of the case.

Improvements to mortgaged property.

Sec 63A: (1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof,

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or where no such rate is fixed, at the rate of 9 p. c. p.a. and the profits, if any, accruing by reason of the improvement, shall be credited to the mortgagor.

Improvements to Mortgaged Property :—The section lays down that the mortgagor is, upon redemption, entitled to the improvements effected on the mortgage property during the continuance of the mortgage without being liable to pay the costs of such improvements, except where it was the mortgagee who effected the improvement and the improvement was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient or was made in compliance with the lawful order of any public servant or public authority. In the case where the mortgagor is liable to pay the costs, such costs will be added to the principal amount of the mortgage-money and carry interest accordingly and where the mortgage deed is silent as to the rate of interest, interest will be payable at the rate of 9 p. c. p. a. Of course, profits arising from the improvements will be credited to the mortgagor. Construction of embankments and excavation of irrigation channels etc. are instances of improvements.

Formerly, there was a conflict of opinion as to whether the mortgagee was or was not entitled to charge or obtain any compensation for the improvements made. In some case it was held that he was not so entitied (see 19 Mad. 327 ; 37 All., 81). On the other hand, in some cases it was held on the authority of *Shephard* v. *Jones*, 21 Ch. D. 469 ; *Sandon* v. *Hooper*, 6 Beav. 246 ; *Handerson* v. *Astwood*, (1894) A. C. 150, that the mortgagee should have charge for his improvements if they were reasonable—see 41 Bom. 69 ; 45 Bom. 1301. What were reasonable improvements and what

was reasonable compensation, had, according to Fisher (see his Mortgage, Art. 1782, 6th Ed.), to be determined by the Court. In enacting the present section the Legislature has accepted this latter view excepting that the determination of the question of reasonableness of the improvements has not been left to the Court, but definite principles have been laid down as to in what cases payment of compensation is compulsory. The mortgagor is bound to pay the costs of improvements which are necessary (i) for the preservation of the property (ii) or for maintaining the sufficiency of the security, or (iii) which are effected under orders of public servant or public authority. The costs of improvement will carry interest at the rate stipulated for the principal mortgage money and in the absence of any stipulation for interest, at the rate of nine per cent. per annum. If the improvements should yield any income the same should be credited to the mortgagor. It is but proper that the mortgagee should not have bothways ; he should not have interest on the capital outlay for the improvements and at the same time the profits arising out of the improvements.

The whole section is subject to any specific contract between the parties, that is to say, it is open to the parties to make special agreements as regards the making of improvements or the payment of costs thereof upon redemption. For instance, if the terms of a deed provide that the mortgagee should be bound to repair the embankment at his own cost in order to keep the property in tact, the cost of reparation could not be charged against the mortgagor on redemption ; otherwise, it could be.

In order to make this section applicable three other things should be noted : (1) The mortgaged property should be in the possession of the mort-

gagee, (2) the improvements should have been effected during the continuance of the mortgage, (3) the improvements must have been effected at the cost of the mortgagee.

N. B. One outstanding principle should always be borne in mind, namely, that you cannot "improve a mortgagor out of his estate." The Court will never regard an improvement as reasonable which will jeopardise the mortgagor's right of redemption, *e.g.* when the improvement puts the matter of redemption beyond the mortgagor's means, 45 Bom. 1301. The principles underlying cases of accessions and improvements are very much the same with this difference that they do not admit of separate enjoyment and therefore the illustrations under the previous section may be consulted in connection herewith.

Sec. 64. Where the mortgaged property is a lease, and the mortgagee obtains a renewal of of the lease, the mortgagor, upon redemption, shall in the absence of a *contract to the contrary*, have the benefit of the new lease.

Raja Kishen Dutt v. *Raja Mumtaz*, 5 Cal., 108. (P C.) B. L. 1910, 1912 (Jan.).

Accessions by the mortgagee do not invariably enure to the benefit of the mortgagor on redemtion, (subject to such compensations as the mortgagee is in equity entitled to get). There may be circumstances under which the mortgagee is entitled to retain them. For example, the mortgagee of a Zemindary acquires certain tenures under it (known as *birt*). On redemption of the Zemindary property by the mortgagor, the mort-

All. 1922 1931 July.

gagee may retain the acquired tenures. But if the mortgagee, taking advantage of his position as such acquires the tenures, he virtually does so in his capacity as a trustee for the mortgagor and therefore he cannot retain them in the absence of a contract to the contrary (see also sec. 90 of the Ind. Trust Act). If the mortgagee should however intend to retain his acquisition after redemption he must keep it separate and not allow it to *merge* in the parental estate.*

To sum up—There are two kinds of accesions; (1) *natural*; (2) *artificial*; artificial accessions again may be divided into two classes; (*a*) acquired physical addition, (*b*) enlargement of interest. All natural accessions enure to the benefit of the mortgagor on redemption; artificial accessions sometimes enure to the benefit of the mortgagor and sometimes not; (see the various provisions of sec. 63). When the mortgagor purposes to take the accession, he must pay the cost therefore except in one case when the accession is voluntary and is not separately enjoyable. It should be further noted that sec. 63 (as well as sec. 70) is subject to *contract* between the parties. So any of the above provisions may be altered by agreement.

What commonly happens in India, in case of accession in the shape of enlargement of interest is that the mortgagee retains the acquired interests provided they are not obtained by misuse of the

* Cf. 17 C. W. N. 586.

mortgagee's power as such, and provided, such interests are capable of separate enioyment and have not been merged into the pàrent estate.*

The mortgagor's right to the renewed mortgaged lease. Secs. 65 & 71.

If the mortgagee obtained a renewal of the lease mortgaged to him the mortgagor upon redemption, shall, in the absence of a contract to the contrary, have the benefit of the new lease (Sec. 64); but on the other hand if the lease be renewed by the mortgagor during the continuance of the mortgage the renewal will enure to the benefit of the mortgagee and his security (sec. 71). Sec. 71 (*e*) provides that if the mortgaged property be a renewable lease-hold, the mortgagee may charge the mortgagor with the cost of its renewal.

We may note here that this **renewal of lease** is practically an 'enlargement of interest' and as such is an accession. This 'accession' is not of the same nature as the acquisition of subordinate tenures dealt with in the Privy Council case of *Kishen Dutt* (5 Cal., 198). The mortgagor has the absolute right to it on redemption and the mortgagee can hold it as his security during the subsistence of the mortgage.

If, however, the mortgagor renders the renewal impossible by purchasing the reversion he cannot defeat the security of his mortgage. By purchase the mortgagor simply *enlarges* his interest in the property and this enlargement must enure to the benefit of the mortgagee and his interest. In

* See *Rajah Kishen Dutt* v. *Rajah Mumtaj* 5 Cal., 198.

short "the mortgagor has the right to redeem not only all accretions to the mortgaged property, but also anything which may be substituted in its place. In a pledge of a flock of sheep, if all the sheep die and are replaced by their young, the mortgagor would be entitled to redeem the latter." (Dr. Ghose): The mortgagee too, in his turn, is entitled to the substituted property as his security.

Liabilities of the Mortgagor fall under two heads: (*a*) general liabilities arising out of implied contracts under the mortgage transaction (sec. 65); (*b*) liabilities arising out of his committing active waste so as to render the mortgagee's security insufficient. The general obligations may be varied by contracts to the contrary, but the obligation not to commit waste is peremptory and not subject to such variation.

Sec. 65. Contracts implied in a Mortgage:

(*a*) There is an implied warranty of title by the mortgagor in the property mortgaged. In case of breach of this warranty—the title having proved defective—the mortgagee can sue for the principal money as well as damages before the stipulated period as the cause of action arises on the breach of the warranty and not at the expiration of the fixed date.

(*b*) There is an implied covenant on the mortgagor's part to indemnify the mortgagee against all expenses incurred in protecting his title. The

mortgagor is bound to defend, or enable the mortgagee to defend his (mortgagor's) title. This rule is based on the principle that the mortgagor is bound to keep the mortgage security in tact by guarding it against all foreign invasion or intrusion.

(c) There is an implied contract on the mortgagor's part during the time of his remaining in possession to pay Government revenue and other public charges. [But under sec. 76 (c) if the mortgagee be in possession the duty of paying Government revenue etc. is thrown on him and the revenue sale resulting from his own default deprives him of his right to surplus sale-proceeds under sec. 73 (1)]. If a sale results from the breach of this implied contract, the mortgagee may, under sec. 68, sue for the mortgage money; and if there be any surplus sale-proceeds after revenue sale the mortgagee will have a charge on them (sec. 73).

(d) There is an implied agreement that, where the mortgaged property is a lease, the mortgagor has, up to the time of the mortgage, paid the rents and performed and observed the conditions in the lease, together with an undertaking that in future he will do the same and in case of his default he will indemnify against all claims arising therefrom. But the obligation imposed by this clause does not attach to the mortgagor, if the mortgage is a possessory one, *i.e.*, if the mortgagee has been put in possession of the lease-hold property.

(e) There is an implied undertaking by the mortgagor that the interests on all prior mortgages will be regularly paid and that the principal

sums in those mortgages will be paid in course of time, and that on the mortgagor's failing to do so the mortgagee will pay off the prior incumbrances, and the expenses made therefor will be an additional charge on the sale-proceeds of the property.

The benefit of the implied contracts passes, but not the burden.

The *benefit* of these implied covenants passes or *runs* with the land; so a mortgagee's assignee is entitled to the same. But the *burden* of these covenants is confined to the mortgagor *alone* and does not pass to a purchaser of the equity of redemption. Thus, where the mortgagor's vendee allows Govt. revenue to fall in arrears and himself purchases the property at a Revenue sale, he (vendee) is not liable to the mortgagee whose security has been extinguished.* His position in this respect is different from the mortgagor. The mortgagee, in such a case, can only look to the surplus sale-proceeds, if any; therefore, he should be on the alert to prevent revenue-sales.

Sonagopally v. Intoory, 26 Mad., 385: A, a mortgagor allows Govt. revenue of the mortgaged property due after the mortgage to fall in arrears and at the revenue sale resulting therefrom purchases the property—*held*, the property will still be subject to the mortgage—for the mortgagor cannot take advantage of the breach of his obligation to the mortgagee and thereby better his position.

Sakharam v. Atma Debji, 14 Bom., 20: A mortgaged a house to B with a stipulation that in case the house is destroyed by *Asmani Sultani* (evils from the skies or the king), A should rebuild it or pay the costs of reconstruction. The house was destroyed by fire—*held*, A was bound

* *Srinivas* v. *Gnana Prokasa*, 30 Mad., 167.

by the agreement, as he was the owner of the property, even after the mortgage, and deterioration of the property would be for his benefit or loss.

Sec. 65A. (*1*) Subject to the provisions of sub-section (*2*), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

Mortgagor's power to lease.

(*2*) (*a*) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(*b*) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(*c*) No such lease shall contain a covenant for renewal.

(*d*) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(*e*) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by

the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

Mortgagor's power to grant lease : Formerly there was no provision in the Act authorising the mortgagor in possession to grant a lease of the mortgaged property during the continuance of the mortgage; so a question arose as to whether the mortgagor could grant any lease of the mortgaged property and whether such a lease when granted was binding on the mortgagee. In England, before the Conveyancing Act, 1881, was passed, a mortgagor could not grant leases which were binding on the mortgagee [see *Corbett* v. *Plowden*, 25 Ch. D. 678; *Robbins* v. *Whyte*, (1906) 1 K. B. 125). In some of the cases in this country this view was followed and it was opined that ordinarily a mortgagor could not grant any leases so as to bind the mortgagee thereby; if any such leases were granted, they were operative only as between the lessor and the lessee and the lessee could enjoy the benefit of the lease so long as the mortgagee did not intervene. But the Calcutta High Court held in a case (40 C. L. J. 500) that a mortgagor may make a lease conformable to usage and in the ordinary course of management, and the tenancy so created will be binding on the mortgagee. In England, subsequently, the Conveyancing Act, 1881, expressly authorised a mortgagor to grant leases of the mortgaged property

for particular periods and this provision was reiterated in sec. 99 of the Law of Property Act, 1925. Accordingly, this new section has been incorporated in this Act expressly providing that a mortgagor shall, subject to express conditions in the mortgage-deed, be entitled to grant a lease of the mortgaged property. In order to protect the interests of the mortgagee certain restrictions have been made ; such restrictions are : (1) The lease should be one that can be made in the *ordinary course of* management and in accordance with local law, custom or usage : (2) The lease should reserve the best possible rent, and no premium or rent in advance should be paid : (3) There should be no covenant for renewal : (4) The lease should take effect within six months of its execution : (5) The lease, if of buildings, with or without the soil, should not be for a term exceeding three years and it should contain a covenant for payment of rent, and in default of payment for a certain period, for re-entry (or *khas* possession). Under this section the mortgagor has the power of granting leases only if he is *lawfully* in possession of the mortgaged property. The section evidently has no application when the mortgagee is in possession. So where the mortgagor has conveyed the property to the mortgagee by an English mortgage he is not free to lease out the property (without the mortgagee's concurrence).*

The whole section is subject to contract be-

* *Official Assignee* v. *Cowasji*, A. I. R. 1930 P. C. 290=128 I.C. 655, P. C.

tween the parties and its terms and conditions may be varied or widened by stipulation between the parties contained in the deed of mortgage.

The provision for "best rent" in sub-sec. (2) has been made with a view to guard against the raising of high premiums by the mortgagor so as to affect the value of the mortgage security. Cl. (3), invalidating covenants for renewal, also is intended to protect the interest of the mortgagee. Cl. (*d*) precludes the possibility of a lease taking effect at a distant date inasmuch as such a lease might operate to the prejudice of the mortgagee when he happens to become its owner by foreclosure or sale. Cl. (*e*) has been enacted with a similar object.

N. B.—Sec. 65A is not retrospective, 10 Pat. 332.

The mortgagor is not responsible for permissive waste with respect to the mortgaged property, but is responsible for active or voluntary wastes.

Sec. 66: Waste by mortgagor in possession: A mortgagor in possession is not liable for the *natural* deterioration of the mortgaged property inasmuch as notwithstanding the mortgage, the ownership of the property remains with him; he can enjoy the property in any way he likes, provided the security remains in tact; but he cannot commit any act which is destructive of, or permanently injurious to, the property so as to render the security insufficient (see also sec. 68 which provides that whether the mortgagor commits any voluntary waste or not, he is bound to make good the security when it becomes insufficient). If the security becomes insufficient the mortgagee may sue for the money without waiting for the expiration of the stipulated period.

N. B.—Destructive or injurious acts are such as felling timbers, removing fixtures, digging excavations to endanger the stability of buildings.

When security is insufficient: A security is insufficient unless the value of the mortgaged property exceeds by one-third, or if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage ; *See Explanation* to Sec. 66.

Rights and Liabilities of the Mortgagee.

N. B.—Sections 67—75 deal with the *rights*, and Sections 76 and 77 with the *liabilities*, of the mortgagee.

Rights of the mortgagee :—

Distinction between Foreclosure and Sale. B. L. 1911 (June).

1. The mortgagee has, at any time after the mortgage-money has become due and before redemption or before the money has been paid or deposited in Court, the right to obtain from the Court a decree for foreclosure of the mortgage or for sale of the property : (sec. 67).

Under what circumstances can a mortgagee sue for mortgage money ? B. L. (Int.) 1914 (July). 1928 (Jan.)

2. The mortgagee has a right to sue the mortgagor for the mortgage-money only in the following cases and in no others :—

(*a*) Where the mortgagor binds himself to repay the debt.

(*b*) Where the security is destroyed or diminished because of the mortgagor's fault.

What are the rights of the mortgagees acc. to T.P.A. ? B. L. (Int.) 1921 (Jan.)

(*c*) Where the mortgagee being entitled to possession the mortgagor fails to give or secure him a peaceful possession.

(*d*) Where independently of the mortgagor's act the security deteriorates and the mortgagor

fails to make it good at the request of the mortgagee. (sec. 68).

3. The mortgagee has a right to sell the mortgaged property under certain conditions without the intervention of the Court in the following cases only :—

(*a*) Where the mortgage is an English mortgage and the parties are not Hindus, Mahomedans or Buddhists.

(*b*) Where the Secretary of State is the mortgagee, and the power of private sale has been conferred by the terms of the mortgage.

(*c*) Where the mortgaged property is situated in the town in which equitable mortgage is allowed and the terms of mortgage expressly authorise recourse to private sale. (Sec. 69).

4. A mortgagee having the right to exercise a power of sale under sec. 69 is entitled to appoint a receiver of the income of the mortgaged property (sec. 69A).

5. The mortgagee is entitled, during the subsistence of the mortgage, to the accession for the purpose of his security (sec. 70).

6. The mortgagee, for the purpose of his security, is entitled to the renewal of a lease (sec. 71).

7. The mortgagee, may spend money—for (i) the preservation of the property ; for (ii) the maintenance of his title against the mortgagor as well as (iii) that of the mortgagor ; and for (iv) the renewal of the mortgaged lease—and add such money to the principal sum, (sec. 72).

8. The mortgagee has a right to set up a claim on the surplus sale-proceeds of the mortgaged property after revenue sale as well as on the compensation money awarded in Land Acquisition proceedings (sec. 73).

9. Any subsequent mortgagee has the right to pay off all prior mortgages and to be substituted (subrograted) in the place of the prior mortgagees with respect to the mortgagor and his property, (sec. 74).

10. The mesne mortgagee has the right to redeem up and to foreclose down.

Liabilities : With the exception of sec. 67A, which obliges the mortgagee to bring one suit on several mortgages under certain circumstances, the Act does not contemplate any other liability of a mortgagee without possession. A mortgagee in possession has certain liabilities which are dealt with in sec. 76.

Liabilities of the mortgagee in possession of the property (**sec. 76**) :— Cal. 1900. All. 1998. Mad. 1886.

(*a*) to manage the property with prudence,

(*b*) to collect the rents and profits,

(*c*) to pay Govt. revenue and other charges of a public nature *and all rent** out of the income of the property,

(*d*) to make necessary repairs if the income of the property permits it,

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* The words in italics have been newly added (in 1929) to make it clear that if the mortgaged property is a lease-hold, it is also the mortgagee's duty to pay any rent which may become due during the period of the lease.

(*e*) not to commit any active waste,

What are the liabilities of a mortgagee in possession in respect of receipts from the mortgaged property? B. L. (Int.) 1913 (Jan.)

(*f*) to re-instate an insured property after loss with the money obtained from the insurance policy or to discharge the mortgage debt with it,

(*g*) to keep clear accounts of income and give them to the mortgagor when wanted,

(*h*) to debit the money, received from the property after deducting the expenses of management, the collection charges, revenues and costs of repairs, first against the interest and then against the principal,

(*i*) to account for the receipts from the property, when the mortgagor tenders or deposits the due amount, without any deduction for expenses after the date of such tender or deposit.

Observe.—Where there is a contract that the mortgagee in possession will appropiate the rents and profits accruing from the property in lieu of interest, or partly in lieu of interest and partly in lieu of defined portions of the principal, no question of accounting arises ; therefore the clauses (*b*), (*d*), (*g*), (*h*), of sec. 76 cannot apply to such a case, (see **Sec. 77**).

Consequently, where there is a contract as aforesaid for appropriating rents etc. in lieu of interest the mortgagee may neglect to collect the rents and profits, and he will not be responsible to any body for the barred debts due from the tenants. He need not make necessary repairs out of the profits realized by him. He need not keep accounts of the profits derived by him, neither is he bound to account for the same to any body ; see 10 M. I. A., 340 ; in the absence of such a contract the rents and profits are however incidents *de jure* to the ownership of the equity of redemp-

tion, and the mortgagee in possession is bound to apply whatever profits he actually receives towards the satisfaction of the mortgage debt; *Aftar Shaik* v. *Sourava*, 25 C. L. J., 560.

Right to foreclose : As the mortgagor has the right to redeem, a corresponding right is given to the mortgagee, known as the *right of foreclosure.* By it is meant that when the time fixed for re-payment of the mortgage money has expired and the mortgagor's right to redeem has become complete and he has failed to avail himself thereof, the mortgagee has the right to institute a suit for a decree that the mortgagor be absolutely debarred of his right to redeem the property. Remember that the right to redeem and the right to foreclose are co-extensive (p. 223). We have already noticed that the right of redemption cannot be modified by agreement between the parties, but such is not the case with the right of foreclosure.

Define the term,—Foreclosure. 1911 (Jan.) A[illegible] 1910.

Right to sell: Under Sec. 67 foreclosure is not the only remedy given to the mortgagee on the mortgagor's failing to exercise his right of redemption. He can as well apply to the Court for an order that the property be sold instead of being foreclosed.

N. B. A right to foreclose or to sell can be exercised only (1) after the mortgage money has become *due*, (2) before a decree for redemption has been made, or (3) before payment of the mortgage debt.

*** *Distinction between Foreclosure and Right of Sale* : Foreclosure is a judicial declaration that

Distinction between Foreclosure

and Sale. B. L. 1911 (June.)

the mortgagor be absolutely debarred of his redemption. So the interest he had in the mortgaged property altogether ceases to exist and the mortgagee who had hitherto only a qualified interest in the property acquires the full interest. "By means of *foreclosure* the mortgagee constitutes himself the absolute owner of the property; by means of *judicial sale* he realizes the actual value of the property in money."—(Shephard and Brown).

Foreclosure implies a forfeiture of interest on the mortgagor's part; therefore, foreclosure can arise only in those cases where such forfeiture is possible; for example, in those cases where there has been a regular *assignment* of the mortgaged property to the mortgagee by way of security with a condition of this assignment being undone under certain circumstances. Again, when forfeiture is against public policy foreclosure is not allowed, *e.g.*, in the case of mortgages of Railways etc. It is on this principle that the right of foreclosure is denied to certain mortgagees in the prohibitions to sec. 67.

Prohibitions as regards Mortgagee's rights: These *prohibitions* (as contained in sec. 67) may be summed up as follows:—

i. A simple mortgagee cannot *foreclose.*

ii. A usufructuary mortgagee *as such* cannot *foreclose* and *sell.*

iii. A mortgagee by conditional sale *as such* cannot sell.

iv. A mortgagee's trustee or mortgagee's legal representative happening to be a mortgagor and 'possessing the power of sale' cannot foreclose.

v. A mortgagee of works of public utility cannot *foreclose or sell.*

vi. A fractional mortgagee cannot sever his interest, and alone sue for the corresponding part of the mortgaged property *without the consent* of the mortgagor and the other mortgagees (9 All., 68, F. B.). A similar correlative restriction is put on the right of a fractional mortgagor. Such a restriction follows as a corollary from the fact that the mortgage is indivisible.

Notice that (i) foreclosure has been denied to all mortgagees excepting the mortgagee by conditional sale or an anomalous mortgagee who has expressly stipulated for foreclosure, (ii) Sale is denied to an usufructuary mortgagee and a mortgagee by conditional sale. The words "as such" in italics above are important, because they indicate the native or primary characteristics of the mortgages in question, but such characteristics may be altered by stipulation or circumstances.

Remedy of foreclosure confined to Mortgage by conditional Sale or an anomalous mortgage with stipulation for foreclosure: We have seen above that implying forfeiture, as it does, the right of foreclosure involves a certain amount of hardship upon the rights of the owner of equity of redemption, and therefore the question of foreclosure, though it is best suited to the genius of English law, has never been viewed with favour by the Indian Courts which are Courts both of law and equity. Dr. Ghose has thus observed

with respect to it in his *Mortgage*, 5th Ed. p 32 : "The right of a mortgagee to foreclose naturally grew in England out of the form of an English mortgage, which consists of a transfer of ownership, accompanied by a condition for transfer upon due payment of the debt, probably the rudest method in which security can be given for the fulfilment of an engagement. In many of the States of America, as well as in Ireland, sale is regarded as the most appropriate remedy on a mortgage. The same practice is followed in countries which have adopted the Roman Law as the basis of their jurisprudence. In English law, however, the more cumbrous mode of proceeding has stood its ground down to the present day, but it may be affirmed without much temerity that foreclosure with its successive periods of redemption, its liability to be re-opened, and the manifest inadequacy of the remedy in complicated cases, is doomed even in England." The Legislature has accordingly thought it desirable to confine the remedy of foreclosure to the case of a mortgage by conditional sale or an anomalous mortgage where, by the express terms of the deed, the parties have stipulated for foreclosure, and to disallow it in all other cases.

It may be remembered that O. XXXIV, r. 4 (new) has conferred on the Court the power of making a decree for sale in lieu of a decree for foreclosure at the instance of a party or some interested person, when the suit for foreclosure is founded on an anomalous mortgage. Of course, in the case of a mortgage by conditional sale the Court has no such power.

Explain the expression—Opening the Foreclosure. Mad. 1891. Bom. 1903.

In this connection we should bear in mind that under the English law, if the mortgagee first institutes a foreclosure action and gets a decree he is not absolutely precluded from suing on the personal covenant to pay. After the foreclosure decree, if the mortgagee finds that the estate is not sufficient to satisfy the mortgage debt, he may pray for a personal decree; but by doing so he gives to the mortgagor a renewed right to redeem the estate. This is known as **Opening the Foreclosure.**

The Remedy of a Simple Mortgagee : he cannot foreclose. He acquires no title to any part of the property because of any assignment by way of security. We have noticed that the mortgage transfers to him only the *right of sale* ; therefore, his remedy is only by Judicial Sale (see p. 264, *ante*). Of course, he can sue on the personal covenant for the mortgage-money under sec. 68 (*a*), as the simple mortgagor "binds himself to repay etc."

Write a note on the remedies open to a mortgagee to enforce his rights in the different kinds of mortgages. B L. (Int.) 1915 (Jan.) 1916 (Jan.)

The Remedy of the Usufructuary Mortgagee : neither foreclosure nor judicial sale is open to him as he realizes his right by possession and enjoyment of the profits, But when the mortgage, usufructuary as it is, also partakes of the nature of a simple mortgage, the right of sale too is given.* When his possession is disturbed, the usufructuary mortgagee can get a personal remedy under sec. 68. If the mortgagor fails to deliver possession to his mortgagee, the latter is entitled to bring a suit for sale of the mortgaged property; 41 Mad, 259 (F. B.)

Distinguish between the cases in which (a foreclosure and (b) Sale are respectively the proper remedy in a mortgage. B. L. (Int.) 1925 (July.)

The Remedy of the Mortgagee by Conditional Sale : is by foreclosure as there is some notion of forfeiture attaching to the mortgagor's failure in exercising his right : he cannot sue for sale. But when he is not in possession he may sue for possession instead of foreclosure. A decree for foreclosure having been obtained, a suit for possession is not any more necessary.

The Remedy of an English Mortgagee : By reason of the prohibition in sec. 67 (*a*) he cannot

* *Bhabani Charan* v. *Kadambini*, 33 C. W. N. 279.

any more sue for foreclosure, therefore, his remedy is by sale. He has also the personal remedy provided by sec. 68 as the English mortgagor "binds himself to repay etc."*

The Remedy of the Equitable Mortgagee : "According to the English practice the proper remedy of such a mortgagee is by a suit for foreclosure, and this practice has been followed in Bombay. Now Proviso (*a*) of sec. 67 expressly supersedes this view. In Calcutta, as also in Madras, the practice has been to decree a sale." (*Srinath Roy* v. *Godadhar*, 24 Cal, 348 ; see p. 205, *ante*)—Shephard and Brown. The present amendment favours the Calcutta and Madras view.

The Remedy, if a Mortgagor becomes a trustee or executor of the mortgagee, is by a suit for sale. The interests of such a mortgagor being self-conflicting foreclosure cannot be the proper remedy for him so long as a suit for sale is possible.†

The Remedy of the Mortgagee of public works : There cannot be any foreclosure or sale in the cases of mortgages of public works, such as railways and canals, as being contrary to public policy. As the continuance of these public works is a matter of common interest, law cannot permit the mortgagee to come in to put a difficulty in the way of its continuance by means of foreclosure or sale. The proper remedy consists in the appointment of a receiver ; see *Gardner* v. *London Ry. &*

* See *Askaran Baid* v. *Gobordhan*, 26C. C. W. N. 318.

† *Lucas* v. *Seale* 2 Atk., 56 ; see Coote on Mortgages, 7th Ed., 1017.

Co., 2 Ch, 201. Compare the provision of sec. 69 A in this connection.

"The remedy of the mortgagee lies in the nature of the interest created"—Explain.

From the foregoing observations it is apparent that every form of mortgage is provided with a remedy peculiar to itself. As different mortgages create different interests, they must necessarily have different remedies. The principle underlying the allotment of remedies in the different cases has already been explained and is not repeated here.

Indivisibility of the right of foreclosure.

Generally, the right of redemption and the right of foreclosure cannot be exercised fractionally, but, when the law allows the breaking up of the integrity of the right of redemption, it will also allow the enforcement of the right of foreclosure piece-meal. If the mortgagor gives his assent the mortgagees may always sever their interests among themselves.

A mortgagee, if he likes, may release a portion of the mortgaged property from the debt; but he cannot do so to the detriment of the mortgagor, so as to impose upon him a personal liability to which otherwise he would not be subject, *Raja Ramranjan* v. *Indranarayan*, 10 C. W. N., 862. (Again, when the mortgagee has security on two properties belonging to different persons he cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected, *Surjiram* v. *Barham Deo*, 2 C. L. J., 202).

***** Release or purchase of one of several mortgaged properties by the mortgagee.**

Release : A mortgagee may release one out of several properties subject to a mortgage and thereby diminish his own security. He is not bound to proceed rateably against all the properties of the mortgagor or to exhaust all of them for the satisfaction of his debt, 11 C. L. J., 639. But when different persons are interested in the mortgaged properties, the

mortgagee cannot release one property so as to increase the burden on the other. Thus in *Enam Ali* v. *Baijnath Ram*, 3 C. L. J, 576, his Lordship has observed as follows, "A mortgagee who has a security upon two or more properties which he knows belong to different persons cannot release his lien upon one so as to increase the burden * upon the others without the privity and consent of the persons affected. The purchasers of the properties not released are entitled to insist that not more than a proportionate share of the mortgage debt shall be levied upon the properties in their hands. Therefore, the properties validly released are also liable to be sold in execution." (Per Mookherji J.,). Also see *Kettlewell* v. *Watson*, 21 Ch D., 685, and *Hakimlal* v. *Ramlal*, 6 C. L. J., 46. But this doctrine has no application where the release takes place at a time when other persons have not acquired any interest in the property and the mortgagor alone is affected by the release, 11 C. L. J., 639.

Purchase: The effect of the purchase of one of the mortgaged properties by the mortgagee is not to extinguish his mortgage security in its entirety.† The relation between a mortgagor and a mortgagee is not so far analogous to that between a trustee and a *cestui que trust* as to preclude a purchase of the equity of redemption by the mortgagee, (see pp. 234-35, *ante*). The rule is subject to the qualification that the Courts if called upon to scrutinise the transaction will look upon it with jealousy, and will set aside a purchase made by the mortgagee when, by the influence of his position or by constructive fraud, he has gained an unconscionable advantage, and has purchased the property for such a low price as may be taken to be fairly indicative of fraud or undue in-

* It has recently been ruled by a Full Bench of the Madras High Court that a mortgagee voluntarily releasing from the suit a portion of the mortgaged property is not bound to abate proportionate part of the debt and is entitled to recover the whole of the mortgage amount from any portion of the mortgaged property, 40 Mad., 568 (F. B.)

† Read *Ponnamadala* v. *Annamalai*, 43 Mad. 373 (F. B.)

fluence. The effect of a transaction is to be judged by its nature. If the sale was intended to be one of the equity of redemption merely, the mortgagee acquired the property subject to his mortgage, and in such a contingency, while there is no extinguishment of his right to enforce the mortgage against the remainder the mortgage is extinguished to the extent of the amount fairly chargeable upon the property purchased by him. If, on the other hand, the sale was of the property freed of the mortgage, and the intention of the parties was that the mortgagee should hold the portion transferred to him freed from the mortgage debt and the purchase money should be applied in reduction of his dues, the mortgagee will not be bound to apportion the debt. In this latter contingency unless the purchases might be sucessfully impeached on the ground of fraud or undue influence, the mortgagee is not bound to allow credit for a larger sum than what was deliberately settled as the price of the portion purchased by him. If the mortgagee purchases the equity of redemption in one only of the mortgaged properties, one of the mortgagors will be entitled to redeem all the remaining properties.*

Mortgagee when bound to bring one suit on several mortgages.

Sec. 67 A : A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

One suit on several mortgages :—The same generous consideration which induced the Legislature to abolish consolidation in sec. 61 has

* *Sidheshvar* v. *Ganpatrao*, 50 Bom., 331.

led to the enactment of this section. Formerly, there was a conflict of decisions as to whether a mortgagee holding several mortgages on the same property was compellable to sue upon all the mortgages together [30 Bom. 156; 25 C. W. N. 129; 20 All. 322; 30 Mad. 353]. This question came to be debated upon in view of the fact that if a person holds several mortgages on the same property and if, he is entitled to foreclose in respect of one them, he will possibly appropriate the property for a nominal amount due under that mortgage and follow the mortgagor's person in respect of the other mortgages; or, if he has the right of sale, the effect will be that the property cannot be sold for an adequate price inasmuch as the property being necessarily sold subject to his other mortgages will scarcely attract any purchaser. This inequity was overcome in certain cases [Cf. 25 C. W. N. 129), by providing suitable reservations prohibiting the sale of the same property twice over or the sale of the property under one mortgage subject to the charge of another mortgage. To meet such difficulties provision has been made in this new section obliging the mortgagee when holding more than one mortgage, as against the *same* mortgagor and open to the *same* form of decree, to institute *one* suit in respect of all the mortgages that have fallen due on the date of the institution of the suit.

In order to attract the operation of the section, the following essential conditions must be fulfilled:

(i) The mortgagee must hold two or more mortgages.

(ii) All these mortgages must be executed by the *same* mortgagors. So where different persons or different combinations of persons appear in the role of mortgagors in the different transactions, this section cannot apply.

(iii) The *same* kind of decree must be open for all the different mortgages. The section will not apply if one of the mortgages entails a decree for foreclosure, another a decree for sale.

(iv) Only such mortgages can be included in the suit as have already become due on the date of the suit.

Two very important points deserve consideration in connection with this section. *First*, the whole section is subject to contract between the parties and the operation of the section can be excluded by express stipulation. The parties may agree that the mortgagee will have the option of suing upon one or more of the mortgages according to his convenience. *Secondly*, the section does not expressly require that all the mortgages should be in respect of the *same* property. Therefore, it will apply even when the several mortgages are held upon different properties of the mortgagor. It will be noticed that the cases of hardship which the Legislature had in view while enacting the section turned upon the existence of a plurality of mortgages upon the *same* property. But they have

thought it fit to extend the equitable principle of the section to cases of mortgages on different properties. N.B. The section is not retrospective, 131 I. C. 725 (Rang.)

We have seen that a mortgagee has *three kinds* of rights—(i) foreclosure; (ii) sale; and (iii) a personal remedy, Sec. 67 makes provision for the first two kinds. The third remedy is provided for in Sec 68. It may be noted that the personal remedy by virtue of which the mortgagee can sue for the mortgage-money is available only in the cases dealt with in Sec. 68 and *in no other.*

Right to sue for mortgage money.

Sec. 68. (*1*) The mortgagee has a right to sue for the mortgage-money in the following cases and *no others*, namely :—

(*a*) where the mortgagor binds himself to repay the same;

Can a mortgagee sue the mortgagor for the mortgage money otherwise than by way of foreclosure or sale of the mortgaged property under any circumstances? B. L. (Int.) 1931 (Jan.)

(*b*) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(*c*) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(*d*) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor:

Provided that, in the case referred to in clause (*a*), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (*a*) or clause, (*b*) of sub-section (*1*), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property.

Right to sue for mortgage-money :— This section, specifies the circumstances under which the mortgagee may sue for the mortgage-money although under ordinary circumstances he may not do so. The following are the circumstances which entitle the mortgagee to sue for the mortgage-money :—

Under what circumstance can a mortgagee sue for mortgage money? B. L. (Int.) 1914 (July.) All. 1900, or All. 1926 (Ext.)

(*a*) When *the mortgagor binds himself to repay it* :— *i.e.*, to say, in order to enable the mortgagee to sue for the mortgage-money there must be a personal covenant on the part of the mortgagor.

Under the English law every loan implies a promise to pay, but in India that is not the case; so in every mortgage here a personal obligation to pay is not imposed on the mortgagor. Whether there is a personal obligation to pay or whether the money is to be paid out of the hypothecated property or to be paid in a particular way is to gathered from the terms of the contract; see also 44 Cal., 388 (P. C.) But when a simple money decree is obtained in respect of a claim under the mortgage, the mortgage property cannot be put to sale by reason of the provisions of O. XXXIV, r. 14 of the C. P. Code. *Vide* notes at p, 192, *ante*. Under sub-section (2), the Court can also stay the money suit until the mortgagee has exhausted his remedy against the mortgage property.

Under what conditions has a mortgagee a right to sue for a personal decree against the mortgagor for the amount of the mortgage money? B. L. Int. 1926 (July.) 1928 (Jan.)

When can the mortgagee sue for mortgage money before the date of repayment? 1915 (Jan.)

(*b*) When the mortgage security is wholly or partially destroyed or rendered insufficient in consequence of any cause other than the wrongful act or default of the mortgagor or mortgagee and the mortgagor fails to make good the same within a reasonable time, the mortgagee can sue the mortgagor for the mortgage money; see 42 Mad. 578 [N. B. Causes contemplated in this clause are such as fire, flood, diluvion, force, *vis-major*, or *asmani sultani* etc.].

But if the mortgaged property, *instead of being destroyed*, is transmuted into any other shape, the security is not destroyed but extends to the new property. Thus, where the mortgaged property is converted into money under Land Acquisition proceedings the mortgage lien is transferred to

what may be said to represent the mortgaged property, *viz.*, the compensation standing to the credit of the mortgagor in the Collectorate.* From Jurisprudence we have learnt that when an immoveable property with a lien on it is transformed into money or moveable property, such property becomes impressed with *the trusts and obligations of the immoveable property.* But if the *new shape* which the property assumes is *uncertain* and cannot be *identified* the mortgagee is not entitled to follow it. His remedy will then be the same as in the case of total destruction of of the property. If a person creates an incumbrance on his undivided share in a property, such encumbrance will be shifted on to the lands allotted to him on a partition between him and his co-sharers.†

What is the effect of partition on mortgage of an undivided share in property? All. 1921.

Baijnath v. Ramoodeen, 1 I. A., 106 : A mortgaged his undivided share in X and Y and afterwards a partition is effected between the mortgagor and his other co-owners by which a property, Z, is allotted to the mortgagor. Here the mortgagor's property become converted into Z ; therefore, the mortgagee must prosecute his claim against Z only and not against X and Y allotted to others.—B. L. (Int.), 1927 (Jan.)

N. B.—But where a partition is effected fraudulently between the mortgagor and his co-sharers so as to affect the right of the mortgagee, the latter can make the partition re-open, *Lakshman* v. *Gopal*, 23 Bom., 385.

When the security is impaired owing to the wrongful act or default of the mortgagee he cannot sue for the

* *Jatuni* v. *Amar Krishna*, 6 C. L. J., 745. ; see sec. 73, *infra*

† *Dinanath* v. *Jadunath*, 29 C. W. N. 202, *Nrisingha Ranjan* v. *Saudamini*, 43 C. L. J. 333 (F. B.).

mortgage-money : when the mortgagee by his own default precludes himself from performing his part of the contract for restoring the property, on redemption, he cannot compel the mortgagor to perform *his* part of the contract. Thus, in *Chitkali* v. *Mathuralal*, 3 C. L J., 200, the mortgaged property was sold for arrears of Government revenue owing to the default of the mortgagee in possession who was therefore disallowed to sue for the mortgage-money. But the revenue sale did not affect the right of redemption. The only exception to the general rule that revenue sale gives a title against all the world is the case where the sale takes place owing to the default of the mortgagee in paying Government revenue, such sale being always subject to the right of redemption.

(*c*) *When the mortgagee is deprived of his security owing to the wrongful act or default of the mortgagor*, *e.g.*, when the mortgagor fails to carry out any of the "implied contracts" under Sec. 65 (see *ante*). Thus, where the mortgagor fails to pay a prior incumbrance on the property or to pay its Government revenue, he becomes personally liable. In a case where the mortgaged property was sold in execution of a decree against a third person who had no title to the property the mortgagor put forward a claim in the execution case, which being disallowed he did not take any further steps, and consequently the mortgagee's security was lost ; here the mortgagor was personally liable as he made *a default* in bringing a title suit after his claim was disallowed. Again, when the mortgagor fraudulently conceals from the mortgagee the fact of a prior mortgage, the mortgagee may sue for the mortgage-money. Such a suit is against the mortgagor personally and not

against the land, and is to be brought within *six* years of the date when the cause of action arose.

This clause however does not entitle a person, who takes a usufructary mortgage which is invalid for want of attestation and who is deprived of his possession by title paramount and not by any act of his mortgagor, to sue for the mortgage-money ; *Kappier* v. *Peria Karuppa*, 42 Mad., 578.

Thabbu v. Girdhari, 6 All., 298 ; A mortgagor sold his interest in a mortgaged property to B ; the mortgagee was then disturbed by B in enjoyment of his security. *Held*, that a sale is not a *wrongful act* within the meaning of sub-sec. (*c*) of Sec. 68.

In this case it was further held (Per Mahmood J.) that the phrase "or any other person" is significantly absent in cl. (*c*) though it is present in cl. (*d*). So that under cl. (*c*), the mortgagor is not liable for the wrongful act of third persons. Moreover, here, it is cl. (*c*) that will apply because the cause of action is the *deprivation of possession*, and not cl. (*d*) which applies where there is *non-delivery* of possession or failure to *secure peaceful* possession.

Ram Narayan v. Adhindra, 44 Cal., 388 : 25 C. L. J. 121 (P. C.) ; The plaintiffs were put in possession of a certain property under a usufructuary mortgage. On the expiry of the term of the mortgage they gave up possession. Thereafter they sued the mortgagor on the allegation that owing to the *wrongful* act of the latter, the mortgagees have failed to realise a greater portion of their debt : *held* the mortgage being a usufructuary one, though originally there was no personal liability on the part of the mortgagor, still such liability arose by reason of sec. 68 (*c*) or (*d*) of T. P. Act.

(*d*) When the mortgagee *is entitled to possession*, but the mortgagor fails (i) to deliver the

same, or (ii) to *secure* the possession thereof to him *without disturbance* by *the mortgagor or any person* claiming under a title superior to that of the mortgagor. When possession of the property is not delivered to the mortgagee (entitled to the same) the mortgagee can sue to recover the mortgage-money, and we have noticed that he can sue for possession as well.

A distinction should be made between *dispossession* and *non delivery of possession* and it should be borne in mind that Cl. (*d*) will not apply unless the mortgagee is *entitled to possession* ; see 6 All., 298, above. When the mortgagor fails to discharge his obligation of making over possession to the mortgagee, the mortgagee is deprived of part of his security and can sue for the mortgage-money.*

The mortgagor is bound to guard against disturbance only by a person claiming superior title, therefore where a mortgagee is disturbed in the quiet enjoyment of his possession by a trespasser, there is no personal liability on the part of the mortgagor, *Nakchedi* v. *Ramcharitar*, 19 All., 191, also 15 Mad. 304 ; 42 Mad. 578.

The opening words of the old section 68 were : "The motgagee has a right to sue *the mortgagor* for the mortgage-money". The words "the mortgagor" gave rise to a doubt as to whether the right of suit was against the mortgagor *personally*

* *Lal Narsingh* v. *Yakub Khan*, 56 I. A. 299=33 C. W. N. 693=49 C. L. J. 588=116 I. C. 414, P. C.

or was against his legal representatives and transferees as well [see 27 M. L. J. 494; 39 I. A. 7]. As to clause (*a*) there was no great difficulty, as that was the case where the mortgagor bound *himself* to repay and therefore no question as to the liability of the transferees could possibly arise. This has now been made clearer by the proviso to sub-sec. (1) which says that in the case of Cl. (*a*) a transferee from the mortgagor or from his legal reprentative shall not be liable to be sued for the mortgage-money. As regards the other clauses, there could be a liability on the legal representatives or transferees according to circumstances. Therefore, the right of suit was not limited to as against the mortgagor only. Therefore, the words "the mortgagor" in the first line of the section have been omitted, to make it clear that under suitable circumstances, even the legal representatives or the transferees may be liable.

N. B. In the cases contemplated by clauses (*b*), (*c*) and (*d*) above the mortgagee can sue the mortgagor *presently* for the mortgage-money before the date fixed for repayment.

Sub-sec. (2) puts a further restriction on the mortgagee's right of suit for the mortgage-money, and provides that in the case of Cl. (*a*) or Cl. (*b*) that is, when the mortgagor binds himself to repay the mortgage-mouey, or when the mortgage security is destroyed or becomes insufficient because of extraneous causes, the Court will have the power of staying the money suit for the mortgage-money or all proceedings in connection therewith until the

mortgagee has exhausted all his remedies against the mortgaged property or its remnant, except in one case, *viz*, where the mortgagee has abandoned his security, and if necessary, has re-transferred the mortgaged property. By obliging the mortgagee to exhaust his remedies against the property before seeking to pursue the personal remedy the Legislature has made it impossible for the mortgagee to get any increase of interest or other undue advantage by the threat of arrest and imprisonment. Where the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property he can at once pursue the personal remedy, because following the property in such a case is out of the question ; besides, by reason of the mortgagee's abandonment of the security, the mortgagor is put in an advantageous position in as much as then he can raise money with the help of the property for the purpose of paying off the mortgagee. The mortgagee cannot, however, under this sub-section, relinquish a portion only of the security so as to increase the burden on the remaining portion. The discretion reserved for the Court for *staying*, instead of striking off or dismissing, the suit for the mortgage-money has a very important bearing on the question of limitation for the suit. The suit for a personal remedy has to be instituted earlier than a suit for getting relief against the property ; so that if instead of *staying* the suit for the personal remedy, the Court had to dismiss it, the result would be that after having exhausted his remedies against the pro-

perty, the mortgagee's suit for money would have become time-barred. To obviate this difficulty provision has been made for staying the suit. So, no question of limitation will arise after the remedies against the property have been exhausted, because then the old pending suit (which has been *stayed* only) will be taken up and continued. The protection in the shape of stay of the money suit pending exhaustion of the remedy against the property is given in the cases contemplated by cls. (*a*) & (*b*) and not in those contemplated by (*c*) & (*d*) ; this is so because in the first two cases, the mortgagor commits no wrong and deserves protection ; but not so in the latter two cases.

Sec. 69. (1) *Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act 1866, a mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court in the following cases (and in no others), namely :—*

Power of sale when valid. B. L. (Int.) 1925 (July.)

(*a*) where the mortgage is an English mortgage and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist (or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council, in the local official Gazette) ;

In what cases can power to sell mortgaged property without the intervention of the Court be given to a mortgagee? All. 1924.

(*b*) where *a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and* the mortgagee is the Secretary of State for India in Council) ;

(*c*) where a *power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and* the mortgaged property or any part thereof, *was, on the date of the execution of the mortgage-deed,* situate within the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab or in any other town *or area* which the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf.

(2) No such power shall be exercised unless and until—

(*a*) notice in writing requiring payment of the principal money has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service ; or

(*b*) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed

exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

(5) *Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.*

Mortgagee's Power of Sale without the intervention of Court: The mortgagee has the power to sell the mortgage property without Court intervention in the following cases and in *no others*;

(*a*) When the mortgage is an English mortgage (although not expressly reserving the power of sale) and the parties to it are not Hindus, Mahomedans and Bhuddhists (nor any Gazetted sect); this means that such power exists in the case of Europeans, Parsis, Jews etc.

(*b*) When the Secretary of State is the mortgagee and a power of sale outside Court is expressly conferred by the mortgage-deed.

(*c*) When the mortgage property is situated in any of the three Presidency towns or in Karachi, Rangoon, Moulmein Bassein or Akyab or any other Gazetted town or area, provided the power of sale outside Court is expressly conferred by the mortgage-deed.

With respect to the cases in cls. (b) and (c) that is, as regards the Secretary of State and the mortgagee of properties in Presidency towns and in certain special towns, a power of sale outside the Court can be possible only if the mortgage-deed contain an *express* power of sale. As regards English mortgages the old section made a distinction between the cases where a distinct power of sale was reserved in the mortgage-deed and where it was not. Where an English mortgage-deed contained an express power of sale the procedure of section 69 applied. But where no express power of sale was reserved the procedure of sections 6 to 11 of Trustees and Mortgagees' Powers Act (XXVIII of 1866) applied instead of this sec. 69. Now this distinction has been done away with and whether a power of sale has been

given by the deed itself or not, such power would exist in respect of all English Mortgages and the procedure prescribed in this section will apply. In order to make it clear that we shall have now nothing to do with the procedure prescribed by the Trustees and Mortgagees' Powers Act, the present section opens with the words "Notwithstanding anything contained etc"

In the first two cases, that is in clauses (*a*) and *(b)*, the situation of the property is immaterial, that is, a power of sale can exist under those clauses wherever in Br. India the property may be situate, but not so with respect to the third case, *i.e.*, the one in Cl. *(c)*. In this latter case the property must be situate in any one of the specified towns.

The power of sale conferred by this section gives the mortgagee a distinctly advantageous position, because it enables him to quickly and effectually realise his dues by selling the property himself by simply complying with the requirements of sub-sec. *(2)* as to written notice etc. without having to go through the elaborate procedure of judicial actions. The mere fact that a redemption suit has been instituted by the mortgagor will not deprive the mortgagee of his power of sale and such power cannot be suspended by an order of the Court. The pendency of such a redemption suit will not affect the power with doctrine of ***lis pendens.***

Conditions under which the power can be exercised :—This power can be exercised *only* (1) when

the principal money or part thereof has remanied unpaid for *three months after service of notice* in writing requiring payment on the mortgagor, or one of several mortgagors or (ii) when interest not less than Rs. 500 in amount is in arrears and remains unpaid for three months. Any one of these two conditions will justify a private sale. Of course, notice of demand cannot be given before the *due* date.

Effect of sale under power: The effect is to destroy the equity of redemption; and to transfer to the purchaser an absolute estate.

The title of such purchaser cannot be impeached on the ground that (i) no cases had arisen to authorise the sale, or (ii) that due notice was not given, or (iii) the power was improperly or irregularly exercised; that is, notwithstanding these defects and irregularties, the purchaser acquires a valid title. No protection is however given to a purchaser who has notice of these irregularities or of the fraudulent conduct of the sale, (*e.g.*, keeping away bidders by contrivance) or is guilty of collusion with the mortgagee (34 I. A., 179). But if the mortgagor is damnified or injured by the unauthorised, or improper or irregular exercise of the powers he has his remedy against the mortgagee holding the sale and is entitled to damages as against him (mortgagee). The mortgagee exercising the powers of sale cannot himself buy the property unless the mortgagor gives his consent.

Disposal of the sale-proceeds: "The proceeds of the sale have first to be applied in discharging

any prior incumbrances subject to which the sale is made, in paying the amount due in respect thereof into Court under sec 57.* As to the balance the mortgagee is constituted trustee for three purposes; (1) for the payment of the costs of sale, (2) for the payment of the moneys, including costs due in respect of the mortgage, under which the sale is made, (3) for the payment of the surplus to the person entitled to the mortgaged property, *i.e.*, the subsequent incumbrancers, and ultimately the mortgagor"—Shephard and Brown.

Responsibility of the mortgagee exercising the power of sale : We have noticed that if the power is exercised in an unauthorised or irregular way the sale so far as the purchaser is concerned stands good but the mortgagee is liable to the mortgagor for damages. But if the sale be not vitiated by any of the three causes mentioned above (see p. 288), the mortgagee is not answerable to the mortgagor for any inconvenience or loss which might have resulted to him from the sale. For example, when the sale fetches but an inadequate price the mortgagee is not responsible for the balance, *Warner* v. *Jacob*, 20 Ch. D., 220.

Sec. 69A. Appointment of Receiver : Provision has been made in this new section on the lines of secs. 101 (iii) and 109 of the Eng. Property Act, 1927, for the appointment of a receiver in all cases where the mortgagee is entitled to exercise the power of sale under sec. 69.* The appointment is to be made by writing signed by the mortgagee or by somebody else *on his behalf*.

* [Cf. *Re Crompton & Co* (1914), 1 Ch. 954; also 47 Cal. 418; 54 Mad. 565].

Any person named in the mortgage-deed may be appointed a receiver hereunder provided he is willing and able to act. Where no person has been so named or the person named is not available, a fresh appointment may be made by the consent of both the mortgagor and the mortgagee. Where the parties do not agree regarding the person to be appointed as a receiver the mortgagee should have liberty to apply to the Court in a summary proceeding, and any appointment accordingly made by the Court will be taken as an appointment by the mortgagee. A receiver is removeable by agreement of the parties reduced to writing and signed by both of thom, or by the Court on the motion of either party. After a receiver has thus been removed, a fresh appointment can be made in the above manner.

The Receiver will be regarded as an agent of the mortgagor who will consequently be responsible for his acts or defaults. But this will not be so, if there is a distinct stipulation in the mortgage-deed to a contrary effect, or if such acts or defaults are due to the improper intervention of the mortgagee.

The receiver will possess the ordinary powers of administration and will make collections from the mortgaged property amicably, or by suit, if necessary, and give valid discharge for all receipts of money, and exercise any power expressly given to him by the mortgage-deed and not inconsistent with the provisions hereof. Even where the appointment of the receiver is invalid a payment to him will exonerate the person paying from liability. The receiver will be remunerated at a rate not exceeding 5 p. c. as is specified in his appointment and if no rate is fixed at 5 p. c. on his gross collections. Of course, it will be open to the Court to allow him a varied rate. On a written requisition from the mortgagee the receiver is bound to insure the property. The money in the receiver's hands should be applied as follows: First, the costs of collections should be paid: then all rents, taxes, land revenue, rates

should be paid ; then all charges having priority over the mortgage and next the receiver's own commission and all insurance premia. Out of the balance, the receiver is to pay the interest (on the mortgage) that has fallen due and if there is a further balance, that should be applied in reduction of the principal of the mortgage if so directed in writing by the mortgagee. The residue, if any, should go to the beneficiary.

The power of appointment under this section can be exercised only if there is no express stipulation to the contray.

The receiver will have power under this section to obtain in a summary proceeding, advice and directions as to management etc. from the Court. The cost of an application for the purpose will be in the discretion of the Court.

The word "Court" in this section means the Court which would have jurisdiction to enforce the mortgage.

We have already noticed that an *accession* to the mortgaged property, enures to the benefit of the mortgagee and his security, and is at the same time subject to redemption (p. 244), *e.g.* a mortgaged field grows in extent by alluvion, the mortgagee will be entitled to hold the alluvial increment for the purposes of his security and the mortgagor can have it on redemption. Where the mortgagor of a property subject to a *mokarari* lease acquired the *mokarari* interest, that interest was held to be an accession to the property and was allowed to pass with it to the execution-purchaser of the mortgage decree, *Surajanarain* v. *Nandalal*, 33 Cal. 1212 Read also secs. 70 & 71, *infra.*

Sec. 70. If after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a *contract to the cont-*

rary, shall for the purposes of the security, be entitled to such accession.

(*Illus.*) : (*a*) A mortgaged a field increased by alluvion, the mortgagee is entitled to the increase, for the purpose of his security.

(*b*) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. B's security extends over the house as well.

Problem : A piece of land is mortgaged to A. The owner afterwards builds a house on the land and mortgages the land with the house to B. Can A recover the mortgage money by sale of both the land and the house ?. (B. L. Int. 1915, Jan.)—Yes.

Sec. 71. When the mortgaged property is a lease and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of his security, be entitled to the new lease.

N.B. It should be noted that both the sections 70 and 71 are subject to the contract between the parties, so the presumptive provisions of these sections may be altered by agreement.

Q. A mortgagee of a leasehold interest is put into possession of the land. After the expiry of the term the mortgagee obtains a renewal of the lease in his own favour from the landlord. Has the mortgagor any right with regard to the renewed lease ? What would be the rights of the mortgagee if the mortgagor obtained a renewal ? (B. L. Int. 1919, July) : See sections 64—71.

Sec. 72 : Rights of mortgagee to spend money : A mortgagee * * may spend* such money for the following purposes as is necessary and may (in the absence of a contract to the contrary) add the amount so spent

to the mortgage debt with interest at the stipulated rate or at 9 p. c. p. a.

(*a*) * * *

(*b*) for the preservation of the mortgaged property from destruction, for feiture or sale ;

(*c*) for supporting the mortgagor's title to the property ;

(*d*) for making his own title thereto good against the mortgagor ;

(*e*) for the renewal of the 'renewable' leasehold mortgaged to him.

Provided that the expenditure of money by the mortgagee under clause (*b*) or clause (*c*) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

N.B. This section applies to all *mortgages alike and is not limited to the mortgagee in possession. A mortgagee whether he is in possession or not is entitled to spend money for the purposes mentioned in cls. (*b*), (*c*) (*d*) and (*e*), subject as regards cls. (*b*) and (*c*) to the proviso that he should not be entitled to exercise that right unless the mortgagor is in default. An expenditure of money by the mortgagee under cl. (*b*) or cl. (*c*) shall not be deemed to have been necessary unless the mortgagor was called upon and failed to take proper and timely steps to preserve the property or to support the title.

A mortgagee entitled to possession under the terms of the mortgage does not prejudice his right to possession by accepting payment of any instalments then falling due.

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* *Sandon* v. *Hoope*, 6 Beav., 246 ; see *Shephard* v. *Jones*, 21 Ch. D. 469.

If he refuses to accept such payment when tendered, interest on the amount ceases to run from that date, *Chalikani* v. *Raja Vatsavaya*, 38 C. L. J., 34 (P. C.)

(*b*) *Preservation from destruction etc.* : A mortgagee may spend money to preserve the property from forfeiture or sale and is entitled to be re-imbursed for the money spent, 30 Cal. 794, *infra* ; 25 Bom. L. R. 843. When from any cause whatsoever all the rights between the mortgagor and mortgagee are likely to be put an end to, the mortgagee preventing the destruction of those rights has the right to claim the sum he has expended for the purpose. This is a necessary deduction from the common principles of law and equity. A mortgagee whether he is in possession or not has the right to tack to the mortgage the amount of Government revenue or rent paid by him to save the estate under sec. 9 of Act XI of 1859 or under other law.* It is the mortgagee's interest to spend money to preserve his security and it would be absurd to think that he will not have the right to promote his own self-interest. But he can do so only if the *mortgagor is in default.*

Upendra Chandra v. *Tara Prasanna*, 30 Cal., 794 ; A mortgagee of a share of an estate deposited, in the Collectorate, revenue and cesses payable by the defaulting mortgagor to save the property from being sold. *Held*, that on general principles of justice, equity and good conscience the mortgagee is entitled to have the amount paid by him on account of revenue added to his original lien ; see also *Rakhohari* v. *Bipra* (31 Cal., 975)

* *Nagendra Chandra* v. *Sremutty*, 11 M. I. A. 241 ; *Foodeni* v. *Ashar*, 10 Pat. 210.

(*c*) & (*d*) *Maintenance of title to the property* : "A mortgagee in possession is entitled to add to the mortgage-money all moneys paid by him for protecting the mortgagor's title and for defending his own title against the mortgagor, *e.g.*, the cost of an unsuccessful action brought by the mortgagor to set aside the mortgagee.* But he is not entitled to the cost of defending his title to the mortgage against a third person"—Shephard and Brown. Thus, in *Pokree Shaheb* v. *Pokree* (21 Mad., 32) a tenant was let in by the mortgagee in possession: the tenant made a default in paying rent ; it was held that the costs of realising the rent from the tenant could not be charged against the land. But the case would have been different if the defaulting tenant were let in by the mortgagor.

(*e*) *Renewal of the lease.* If the lease be not renewed, the mortgaged property becomes extinct ; hence the provision, 'Renewable leasehold' means property held under a lease containing a covenant on the lessor's part to renew.

N. B, Interest allowed on the additional amount expended for the above purposes is 9 p. c., where no rate is fixed, and the whole section is subject to a contract between the parties.

What provisions are contained in T. P. A. with reference to the insurance

Charge for insurance of the mortgaged property : Where the property is insurable (being liable to destruction by fire etc.) the mortgagee may insure it for an amount not exceeding the amount speci-

* *Dattaram* v *Vinayak*, 28 Bom, 181 ; *Parsotim Thakur* v. *Lal Mohar*, 58 I. A. 254=54 C.L.J. 1=35 C.W.N. 786, P.C.

of mortgaged property ? Bom. 1900.

fied in this behalf in the mortgage deed or (if no amount is specified) two-thirds of the money required to reinstate the property in case of total destruction and he may add the insurance premia to his principal amount with interest at the same rate as is payable on the principal money, or, where no such rate is fixed, at the rate of 9 p. c. p. a. The insurance premia stand on the same footing as the other necessary costs and charges, as there is no good reason to make a distinction between the two. But the mortgagee is not entitled to insure where the mortgagor has insured to the specified amount and keeps up the insurance.

Right to proceeds of revenue sale or compensation on acquisition. B. L. (Int.) 1931 (July.)

Sec. 73 (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immoveable property, the mortgagee shall be entitled to claim payment of the mortgagee-money, in whole

or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

Right to proceeds of revenue sale or compensation on acquisition :—The section consists of two parts ;. The *first* part deals with the case where the mortgaged property is sold for arrears of revenue or rent. The *second* part deals with the case where the mortgaged property is compulsorily acquired and compensation is paid for the acquisition. The effect in either case, virtually, is that the mortgaged property is transmuted into a new shape ; this new shape is the sale proceeds in one case and the compensation-money in the other. This section provides that when the mortgaged property is so converted into a new form, the mortgagee's lien attaches thereto and the mortgagee becomes entitled to claim payment of the mortgage money, in whole or in part, out of the surplus sale proceeds or the compensation-money as the case may be. The old section used the word "charge" and said that the mortgagee will have a *charge* on the money in question which takes the place of the mortgaged property. But the new section instead of using the word "charge" says that the mortgagee shall be ***entitled to claim payment of the mortgage-money*** out of the surplus sale-proceeds

or the compensation-money. The reason for this alteration has been thus explained by the Special Committee: "The use of the word 'charge' appears to us to be unhappy inasmuch as a charge under section 100 relates to immoveable property and is enforced as a simple mortgage. The procedure for enforcing a simple mortgage obviously does not apply to the enforcement of a claim against a *fund*. The use of the word also leaves the remedy of the mortgagee uncertain".

The old section was confined to the case of revenue or rent sale only, and did not contemplate the case of compulsory acquisition. So, there arose a conflict of decisions on the point whether the principle underlying the section applies to a case of compulsory acquisition. The Allahabad High Court held that the mortgagee was entitled to claim only an apportionment of the compensation-money in the acquisition proceedings and had no charge on the amount (see 16 All.. 78). But a contrary view was taken in 6 Mad., 344; 13 C. W. N. 350; 5 Pat. L. J. 650., and it was opined that the compulsory acquisition of a property did not amount to its destruction within the meaning of section 68 and that the property acquired was converted into money (13 Mad., 321). This section is based on the general principle of 'conversion' according to which the amount awarded as compensation is impressed with the charge to which the land is subject. " In England, where money is paid into Court as the proceeds of real estate converted by compulsory powers under Acts of

Parliament, as under sec. 69 of the Land Clauses Consolidation Act, it usually remains in Court subject to the rights of the parties interested in it to have it re-invested in land, and it is considered to be impressed with the quality of real Estate (*In re Stewart*, 1 Sm. & G. 32; 1 W. & T. L. C. 393, 8th Ed.). The view taken by the majority of the High Court is in accordance with the general principle stated above". The present sub-section (2) has been enacted in comformity with the majority view. The mortgagee can claim to be paid out of the surplus sale proceeds only if the revenue or rent sale results from a cause for which he was not responsible. Under sub-sec. (3) the mortgagee's claim prevails against all other claims except those of prior encumbrancers. Such a claim (of the mortgagee) may be enforced notwithstanding that the principal money on the mortgage has not become due.

Priority.

N.B. Sections 78, 79, 80 deal with the question of Priority of Securities.

Under what circumstances is a prior mortgagee postponed to the subsequent mortgagee under the Ind. Law? B L (Int.) 1914 (July). 1918 (Jan.). 1923 (Jan.) 1925 (Jan.) 1926 July. Mad. 1912. All. 02

Sec. 78. Postponement of prior mortgagee: Where through the fraud, misrepresentation or gross neglect of a prior mortgagee, a subsequent mortgagee is induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

We have noticed in section 48 that a prior transfer takes precedence over a subsequent trans-

Give instances of cases in which priority between mortgagees may be lost or postponed by conduct. B. L. 1911 (June.)

fer of the same property. The present section furnishes an instance when such priority may be postponed and mentions three occasions for the same: When the prior transferee is guilty of *fraud*, *misrepresentation* or *gross neglect* this section becomes operative, These three ingredients are however disjunctive and cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive; 43 Cal., 1052. The principle is the same as in the case of an estoppel. *Fraud* has been defined in sec. 17 and *misrepresentation* in sec. 18 of the Contract Act. As to what is or is not *gross neglect* circumstances of each case have to be considered. But it has been maintained that "gross negligence" is negligence with a vituperative epithet, *Colyer v. Finch*, 2 H. L. 905, 924.

Silence on the part of a mortgagee when directly appealed to by a person about to make advances on the security of the property already mortgaged to him is misrepresentation; so is attestation by a mortgagee of a second instrument with a full knowledge of the purport of the same. "Negligence" does not imply a fraudulent motive; an innocent man may be negligent and suffer the consequence. An equitable mortgagee, who parts with the title-deeds, and so enables the depositor to make another equitable mortgage, may be postponed to the second mortgagee by reason of his laches—on the principle that as between two *innocent* parties one must suffer who has permitted the fraud to be committed, *Waldron*

Develop the law relating to priority amongst successive mortgagees

v. *Sloper*, 1 Drew, 193. So in a case * before the Judicial Committee, Lord Macnaghten has thus observed, "the circumstances that a prior mortgagee leaves the title deeds with the mortgagor, would, if unexplained, justify the postponement of his security to the security of another created by deposit of the deeds." Whether an act or omission amounts to gross negligence or not is to be judged in the light of the circumstances of each case. In *Mutha* v. *Sami*, 8 Mad., 200, the mortgagee handed his mortgage-deed to another person by way of security and the latter gave it to the mortgagor who sold the property. There was no endorsement on the document to induce the purchaser to believe that the mortgage was paid off, so the mortgagee's conduct was held not to amount to negligence especially when the purchaser had notice of the mortgage and there was no fact to justify his belief that the mortgage had been paid off; also read 43 Cal., 1052 below :—

of the same property. Give illustrations. B. L. (Int.) 1927 (Jan.)

Nandalal v. **Abdul**, 43 Cal., 1052 : A sold a certain property to B, but retained possession of his property under a mortgage executed by the vendee, B, in his favour for the unpaid balance of the purchase money. The title deeds of the property remained with B, who was thereby able to obtain a second mortgage on the property by deposit of those deeds. Besides, there was no reference to A's mortgage in the sale deed : *Held*, that A's negligence to recover the title deeds was such as would postpone his mortgage; therefore, the second mortgage had priority.

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* *Maung Tha Hnyin* v. *Maung Mya*, 37 Cal. 23=11 C. L. J. 166 (P. C.).

Mortgage to secure future advances.

Sec 79. When a mortgage is made to secure future advances, either in addition to or without present indebtedness, and a maximum sum is fixed up to which the future advances are to be made, a subsequent mortgagee of the same property *with notice* of prior mortgage on it will not acquire priority over the prior mortgagee with respect to the advances made after the subsequent mortgage. Thus, A, to secure a current account with a Bank, mortgages his property to it and settles that advances are to be made up to Rs. 10,000. When A has drawn Rs. 4,000, he mortgages the same property to B who is aware of the previous mortgage. Here B will not acquire any priority over the mortgage to the Bank with respect to Rs. 6,000 which the Bank has still to advance. But if the advances exceed Rs. 10,000, B's mortgage will have priority over that excess. The words "with notice," as we shall see hereafter, might cause some confusion. Now registration and possession being notice, it is difficult to conceive a case where a subsequent mortgage can take without notice of the prior mortgage. *Notice*, if it means anything here, must refer more to the maximum limit than to the fact of the mortgage. The maximum limit may be concealed from the subsequent mortgagee when the mortgage is by delivery of possession or by deposit of title deeds. In that case the subsequent mortgagee acquires a pritority over the prior mortgagee by reason of sec. 78. In a section no words should be taken as meaningless; we must attribute some signific-

ance to every phraseology. Therefore, the words "with notice" here must be understood to signify that if the subsequent mortgage is taken in ignorance of the maximum limit of the prior mortgage, the prior mortgage will be postponed to the subsequent mortgage in respect of the advances made after such subsequent mortgage. It is needless to say that where no maximum is fixed, advances made after the subsequent mortgage, get no priority over the latter.*

The difference between the English law and the Indian law on the point.

This law of the T. P. Act is somewhat different from the corresponding English rule. Under sec. 79 the priority of the first mortgagee depends upon *whether the subsequent mortgagee had or had not notice* of the prior mortgage. But under the English law the priority is determined by the fact, *whether the first mortgagee had or had not notice of the second mortgage when the subsequent advances were made.* In England they are not concerned to see whether the second mortgagee had notice of the first mortgage or not. There, the first mortgagee may go on making advances until the maximum fixed is reached provided he does not know anything about the second mortgage. So when both the mortgagees have mutual notice, the Indian law will protect the prior mortgagee and the English law will protect the second mortgagee in sespect of the advances made after notice. But when neither party has any notice, the Indian law will

* *Imperial Bank v. U. Rai Gyaw Thu Co., Ltd.,* 39 C L J. 186 : 28 C. W. N. 470 P. C.

tend to favour the second mortgagee and the English. law will give unconditional priority to the first mortgagee. The leading English case on the point is *Hopkinson* v. *Rolt*, 9 H. L. C. 514.

N. B. We have already seen in sec. 58 that a mortgage may be made to secure payment of money *to be advanced* by way of loan, or to secure a *future* debt and this section furnishes an illustration of a mortgage for a *future debt.* In sec. 93, tacking of mortgages, has been abolished and sec. 79 has been referred to there as being an exception to to the general rule abolishing tacking. Strictly speaking there is no question of tacking in this section, and the legal position contemplated herein would follow as a necessary corollary to the general rules relating to mortgages and the law would not have been different even if this section had now been dropped from the Statute Book. We have seen at p. 215 that a mortgage takes effect from the date of its completion and not from the date when the balance of the *promised* consideration is paid. Therefore in the illustration given at p. 302 the Bank becomes a mortgagee prior in time as compared with B although the advance of Rs. 6000 was made on a subsequent date; and the question of notice on B's part is absolutely redundant. This is so because of another reason. Now, registration and possession are notice. So, B can scarcely go without notice of the Bank's mortgage, even if such mortgagee be by dsposit of title deeds, which must necessarily be in the Bank's *possession.* Therefore, correctly speaking, the condi-

tion as to notice on B's part is wholly unnecessary as it goes without saying. There would have been a case of tacking if there was a *different* mortgage in respect of the subsequent advance. But there is only one mortgage in favour of the Bank though the consideration is broken up and paid at different times.

Govindrav v. **Ravji**, 12 Bom., 33. One P, mortgaged a certain property to D in 1869, and subsequently in 1871, sold his equity of redemption to the plaintiff. Obviously when the plaintiff bought *the equity of redemption* he had notice of the mortgage of 1869. Then in 1873, P again received some advances from D on the security of his original mortgage. The plff. did not say anything to D though he knew of the advances at the time they were made. *Held*, that notice of the plff's purchase to D was not necessary to complete his (*i.e.*, plff's) title as an assignee of the equity of redemption (as the principle of tacking is not applicable in India). But as the plff. stood by and thereby allowed D to make further advances, on the general principles of equity, D would get a better title. (The facts of the case have been slightly altered to suit our purpose.)

Sec. 81. The Doctrine of Marshalling: If the owner of *two* or *more* properties mortgages them to one person and then mortgages one or more of these properties to another person, the subsequent mortgagee has the right (in the absence of a contract to the contrary) to throw (*i.e.* to marshal) the property not mortgaged to him on the first mortgagee requiring him to be satisfied out of the same *so far as that property will go*, and keep the second property for his benefit if the first property is sufficient to satisfy the first mortgagee's claims. But if the first property be not sufficient to meet

The rule relating to marshalling.
B. L. 1911 (Int.) 1915 (Jan.) 1917 (Jan.) All. 1925 Ext. All. 1925 (Int.)

Explain the term "Mashalling of Securities." 1915 (Jan.) All. 02, 05. 1926, Ext.

Mad. 09, 11. Bom. 06, 04.

Lanoy v. *Duke of Athole.*

the 1st mortgagee's claims, the second mortgagee cannot 'marshal (or arrange) the securities'. Thus, Lord Hardwicke has laid down in *Lanoy* v. *Duke of Athole*, 2 Atk., 446 :—If a person, having two *real* estates, mortgages both estates to A, and afterwards mortgages one only of the estates to B, whether or not B had notice of A's mortgage, the Court directs A (but always without prejudice to A) to realize his debt out of that estate which is *not* in mortgage to B—leaving the estate in mortgage to B to satisfy B—so far as it goes to satisfy his (=A's) claim. The rule of marshalling is independent of the question whether the subsequent mortgagee has had notice of the prior mortgage or not. Read Lord Romilly's observations in *Gibson* v. *Seagrim*, 20 Beav. 614 ; also *Flint* v. *Howard*, (1893) 2 Ch. 54 ; 18 Bom. 160 ; 22 Bom. 304.

The principle on which it is based. B. L. 1911 (Jan.) 1930 (July.) All. 1899.

What is the general principle of marshalling as laid down in the T. P. Act ? B. L. (Int.) 1929 (July). 1931 (Jan.) 1931 (July.)

The principle of marshalling is based on equity. In a case of marshalling the first mortgagee has more securities than the *subsequent* mortgagee; so if the first mortgagee avails himself of that security which is also the security of the *subsequent* mortgagee, the *subsequent* mortgagee is likely to be completely frustrated. But by making the former mortgagee fall back at the first instance upon the security not comprising the security of the *subsequent* mortgagee, equity does not affect his rights and at the same time affords the subsequent mortgagee a chance for satisfying himself. It is no doubt unfair to give one of two persons with equal equities all the privileges and the other none especially when something could possibly be done

in favour of the one without prejudicing the other. Or, in other words, the equitable principle is, as *Aldrich* v. *Cooper** has expressed it, "it shall not depend upon the will of one creditor to disappoint another." It should be noted that the scope of the present section has been widened; it is no longer limited to the case of a prior mortgagee with *two* securities only; but extends to the case of a mortgagee with a plurality of securities. The use of the word *subsequent* in the place of the old word *second* has also very much widened the scope of the section.

⁂ *The Rule is however subject to the following limitations.*

1. The rule cannot be applied so as to prejudice the prior mortgagee. If the property not mortgaged to the subsequent mortgagee is not sufficient to satisfy him (*i.e.* 1st mortgagee) he can proceed against the other property as well.

Limitations to the rule i.e. the conditions under which marshalling of securities is or is not allowed. B. L. 1911 (Jan.)

2. It cannot be so applied as to prejudice the interest of a third person *who has for consideration* acquired an interest in any of the properties. *e.g.* when the property not comprised in the security of the second mortgagee who can exercise the right of marshalling, is mortgaged to or purchased by a third party; a subsequent mortgagee cannot *marshal* to the prejudice of this third party; *vide* Ex. 1, below.

State the circumstances when marshalling cannot be allowed. B. L. (Int.) 1915 (Jan.)

3. This principle does not apply unless the *same* person is liable to both the creditors (see

Explain and illustrate the principle of

* 1803, 8 Ves., 382.

marshalling of securities, its conditions and limitations. B. L. (Int.) 1921 (July.) 1923 (Jan.)

Exparte Kendall, 17 Ves. 514), and is the owner of the properties.

4. It does not apply unless the first mortgagee has equal rights over the two properties mortgaged to him, *e.g.*, when he has a charge on one property but on the other he has a right of set-off, (*Webb* v. *Smith*, 30 Ch., 192), there can be no marshalling as the securities are not equal.

Can the purchaser of a *portion* of the mortgaged property claim a right to marshal. B. L. (Int.) 1929 (July.)

5. It does not apply where only a *portion* of the property already mortgaged is subsequently mortgaged to another person, *i.e.* it does not consider different fragments of the same property to constitute different properties.

6. When the first mortgagee with a plurality of securities or the *plural* mortgagee, as one may feel tempted to call him, has a right of *foreclosure*, the subsequent mortgagee cannot claim marshalling (as he cannot divide the prior mortgagee's claim). His remedy, then, will be to redeem the previous mortgage. But if the action be for *sale* marshalling can be claimed.

Gopala v. Samına, 12 Mad., 255, following *Ex parte* Kendall, *Supra* : A and B were the members of an undivided family and a property of the joint family was mortgaged to the plff. Subsequently, on a partition between A and B the mortgaged property was allotted to A. Afterwards B hypothecated part of his share with C, who got a decree against him and purchased that part. On a suit by the plff. against the entire property C contended that the plff. should first proceed against the property of A (which was not mortgaged to C), But this contention was disallowed on the ground that plff. was the mortgagee of the entire property, and that A and B were equally liable to him ; he

cannot proceed against A alone to the exclusion of B. In the first transaction both A and B are mortgagors and in the second B only is the mortgagor. Marshalling cannot be allowed where the *same* person is not the mortgagor.

Ex. 1. Properties X and Y belonging to the same person are mortgaged to A; property X is then mortgaged to B who has no notice of the mortgage to A and then Y is mortgaged to C who has no notice of either of the prior mortgages, Can either B or C claim the benefit of the rule of marshalling? Give reasons, B. L. (Int.), 1911 (Jan.); 1913 (July). [B cannot compel A to marshal in his favour if that course will prejudice C. Nor C can claim the benefit of marshalling to the prejudice of B. Under such circumstances A is entitled to a rateable distribution of his security over the two estates leaving the surplus proceeds of each estates to be applied in payment of the respective debts of B and C- See *Gibson* v. *Seagrim*. 20 Beav. 614; *Flint* v. *Howard*, (1893) 2 Ch. 54.

B. L. 1911 (Jan.) 1913 (July.) All. 1922.

Ex. 2. In the above illustration "will B be permitted to compel A to marshal in his favour? If so, under what condition"?—B. L. 1912 (Jan): *Ans*: Now, the principle of *Flint* v. *Howard*, 2 Ch. 54, which makes notice on C's part immaterial being applicable in this country, B will not at all be permitted to marshal to the prejudice of C.

Q. Can the purchaser of a portion of the mortgaged property claim a right to marshal?—Cal. 1929 (July); 1931 (Jan.):—*Ans*: The doctrine of marshalling has not been extended to a case where only *a portion* of the property already mortgaged is subsequently sold or mortgaged. The sale of the property in portions may not fetch an adequate price and may prejudice both the mortgagee and the mortgagor.

N. B. We have already seen that now the question of notice of the prior mortgage to the subsequent encumbrancer is immaterial. As sec. 56 has been brought into line with this section,

marshalling can be claimed by a subsequent vendee from the mortgagor just as much as all subsequent mortgagees from him can. The question of notice not being pertinent, the fact that the earlier mortgage was by registration will not affect the position of the claimant for marshalling.*

Distinction between marshalling and contribution. B. L. 1911 (June.) 1916 (Jan.) 1917 (Jan.) 1918 (Jan.)

Contribution : Contribution is but another form of marshalling. Marshalling arises when the competing mortgages hold from *one* mortgagor and contribution arises when the mortgaged properties belong to *several* owners. "Contribution, if it differs from marshalling, does so in species rather than generically ; in form rather than in nature. Marshalling and Contribution are each of them the adjustment between several persons of their rights respectively, *inter se*, in respect of a charge or claim which affecting all of them or properties belonging to all of them respectively, has been or may be enforced in a manner not unjust so far as the person is concerned by whom it was or may be enforced, but not just as between the person or properties liable" *Per* Vice-Chancellor, Knight Bruce in *Tomos* v. *Rock*, 2 Coll., 500.

Explain clearly with illustrations the basic principles of marshalling securities and contribution. 1930 (Jan.)

These rights are reciprocal. By marshalling a creditor having several securities is so to exercise his right as not to injure the right of another creditor on some of those securities. By contribution, all the securities are equally to contribute and the whole liability is not to be thrown on one only.

All. 1922.

Sec. 82. Contribution to mortgage-debt. Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to

State accurately the doctrine of contribution to mortgage debt, the

*Cf. *Maguiram* v. *Mehdi Hossein*, 31 Cal. 95, 102.

the contrary, liable to contribute rateably to the mortgage-debt.

circumstances under which it may be invoked and the mode of its calculation, B. L. (Int.) 1921 (July.) 1930 (July.) All. 1925 (Ext.). All. 1926(Int.

The value of the different properties or the different portions of the same property, that is, the interests of the different co-owners should, for the purposes of contribution, be calculated as *at the date* of the original mortgage, of course, making proper allowances for the charges to which the properties may happen to be subject, 12 C. W. N, 107; 745; 27 All. 549. The mode of valuation herein adopted has the sanction of the Judicial Committee who, in assessing contribution to a decree for mesne profits, assessed liability at the date of the decree (31 I. A. 94).

When one of two properties of an owner is first mortgaged to secure one debt and then both the properties are mortgaged to secure another debt, the former debt is to be discharged out of the first property, and the second debt is to be distributed over the two properties in proportion to the values that remain after the discharge of that first debt.

Illustration : Two estates X and Y (the values whereof are Rs. 1,000 and Rs. 800 respectively) are mortgaged to D for Rs. 1,000, X having been previously mortgaged to C for Rs. 200; X and Y are sold to E and F respectively. What amount would E and F each have to pay to satisfy the debt? State reasons : B. L. (Int.), 1913 (July) :—*Ans.* : After deducting Rs. 200 from Rs. 1,000 (the original value of X) we see that X and Y become equal; therefore each of E and F should pay Rs. 500.

Proviso : Nothing is this section (S. 82) applies

to a property liable under section 81 to the claim of the subsequent mortgagee.

The scope of the section as at present worded is very wide. The section now covers the case not only where several properties are mortgaged, but where the mortgaged property is subsequently subdivided into distinct and seperate portions, This is an accordance with the decisions in some cases in which it has been held that when the title becomes severed after the mortgage either by the death of the mortgagor or by the sale of the shares in the property by the mortgagor, the rule of contribution applies, 1 All., 455 ; 20 Bom. 615 ; 21 C. L. J. 104 ; 43 All. 589). See Ex. 1, below. The question of contribution arises as between the mortgagors *inter se*, and is of no avail against the mortgagee, who is entitled to enforce his security in any manner and as against any property he likes. The expression "contract to the contrary" does not include a contract between the mortgagor and his assignee, 27 N. L. R. 258. A co-mortgagor cannot offer to discharge the proportionate share of his liability. He may redeem the whole mortgage and then sue his co-mortgagor for contribution. No extrinsic principles can be introduced to modify the statutory provisions of this section, 57 I. A. 189=52 All. 358=34 C. W. N 661 52 C. L.J. 117, P. C.

Ex. 1. A Mahomedan, owning a property, mortgages the same for Rs. 300 and dies leaving a son and a daughter. The son inherits ⅔rd of the property and the daughter ⅓rd.

If the mortgagee realises his Rs 300 by selling the son's share, the son can recover Rs. 100 from the daughter,

We have seen that marshalling and contribution are both based on the same equitable principle that the benefit and liability of a transaction go hand in hand. You cannot derive benefit without incurring liability that is associated with it or enjoy benefit to the prejudice of another when you can help it. The right of contribution is, however, controlled by the right of marshalling. When these two rights conflict, marshalling is to prevail, *e.g.* properties X and Y are separately mortgaged to B and C and then mortgaged together to D and afterwards X is mortgaged to E. Here, E has the right to compel D to resort to property Y in the first instance (section 81). On the other hand (under section 82) the two properties X and Y are liable to contribute to the debt secured by them rateably, and it might conceivably be to the advantage of a person interested in the equity of redemption to have the debt so apportioned, with the result that E's security might diminish. Under such circumstances marshalling overrides contribution. See the *proviso* to Sec. 82.

Which will prevail when there is a conflict between Marshalling and Contribution? 1929 (Jan.) All. 1905. Mad. 04, 08. 1915.

Both marshalling and contribution are subject to the contract between the parties. So any of the provisions of these laws may be altered by agreement. Just as in the case of marshalling, there is absolutely no question of notice affecting the position of the different persons liable to contribute. Thus, when properties X and Y are

Notice not material to contribution.

mortgaged to A and then X to B and Y to C neither B nor C having any notice of the prior mortgage at the time of his mortgage, it would be a case for contribution (*vide supra*), no matter whether B and C took their respective security with notice of each other's mortgage.

Limitations to the rule of contribution :

(*a*) The general rule of contribution does not apply when payment is made by a person primarily liable, *e.g.* a mortgagor sells a portion of his property with a covenant that the entire burden should fall on the purchaser, the purchaser cannot make the mortgagor contribute, 2 All., 115, Similarly, a mortgagor cannot claim contribution against his grantee.

(*b*) Right of contribution may be altered by contract.

(*c*) If a particular property is a primary security for a debt, it will be thrown entirely on such property.

(*d*) When the two properties are not subject to equal burden there can be no contribution; thus, a testator made a *specific* charge on one property and a *general* lien on the rest of his properties in favour of a creditor. Here the devisee of the *specific* property could not claim contribution against the persons on whom the rest of the properties devolved ; *In re Dunlop*, 21 Ch. D., 583.

(*e*) No contribution, where contribution is controlled by marshalling, as in case of conflict between the two, marshalling prevails, *vide supra*, p. 313.

Ex: A mortgages X and Y to B: then he mortgages X alone to C; then he mortgages X and Y to D. If the sale-price of the properties is insufficient to pay off C and D in full, how will their rights be adjusted. (All. 1926—Int. and Ext.)—*Ans*: B will have to fall back upon Y; the insufficient balance of X will satisfy C as far it goes; the insufficient balance of Y will satisfy D so far as possible.

Deposit and Tender of the Mortgage money. We have noticed that after the principal money has become due or before the right of redemption has been foreclosed, the mortgagor may (1) pay the debt, (2) may tender the amount due *out of Court* at a proper time and place, (3) or, bring a regular suit for redemption, and (4) deposit the amount in Court. The other points save the last have been dealt with in their proper places (*vide ad loc*); **section 88** makes provision for the mortgagor's power to deposit in Court. This power is given to the mortgagor because the mortgagee may altogether deny the fact of any tender out of Court. The deposit may be made at *any time* after the principal money payable in respect of a mortgage has become *due* and before a suit for redemption is barred. So the deposit must be made during the period while it is still open to the mortgagor to institute a suit for redemption. So, where the period of limitation for a redemption suit has expired there is no right to deposit hereunder.

Power to deposit money due on mortgage.

When the deposit is to be made.

In which Court to deposit?

The deposit must be in the proper Court, *i.e.*, in the Court in which the mortgagor might have brought his suit for redemption.

Who may deposit.

The deposit must be made by the mortgagor himself or any other *person entitled to institute the suit for redemption.* Persons so entitled have been enumerated in Sec. 91, below. When there are successive mortgagees on the property, the deposit may be made by the next mortgagee under Sec. 91. Again, when the person entitled to make the deposit is incompetent to contract, such deposit may be made by his legal curator or guardian *ad litem.* The deposit can as well be made by the party's agent.

To deposit to whose account.

The deposit must be made to the account of the mortgagee, or to the account of the person in whom the right of the mortgagee has vested, *e.g.*, the Official Assignee of the mortgagee on insolvency, or to the account of the person entitled to receive the money on the mortgagee's behalf. A deposit made to the joint credit of the mortgagee and another is not a valid deposit.*

The deposit must be of the full amount.

The deposit must be of the full amount at the time due on the mortgage-principal *plus* interest. Even when a separate decree has been obtained by the mortgagee for interest the mortgagor is not justified in depositing a less amount.

The deposit must be unconditional and the depositor should not impose any condition on the mortgagee. A deposit with a denial of the mortgagee's title is invalid.

Procedure for withdrawal of the deposit-money by the mortgagee.

On the deposit being made, the Court should cause a notice to be served on the mortgagee. The mortgagee on receiving the notice must present a verified petition, stating the amount then due and his willingness to accept the money in full discharge of his debt and must deposit the mortgage deeds and all other connected documents in his possession and power. Deposit made under this section has the effect of a valid tender and the withdrawal of the deposit money by the mortgagee has the effect of discharging the mortgage (17 Mad. 267). The mortgagee, before he is entitled to draw the money is required to file all documents of title that are in his possession and if the mortgagee be in possession of the mortgaged property, he may be required to execute a reconveyance or acknowledgment as he would be required to do under sec. 60, *ante*. (N.B.—the mortgagee cannot appeal against the decree for redemption following such deposit).

When the mortgagee refuses to accept the money in full discharge he may, nevertheless, withdraw the amount with the mortgagor's consent and may then sue for the balance, 32 All., 142. When acceptance has been refused the parties remain in the position of mortgagor and mortgagee, but the mortgagee however, (*i*) is not entitled to further interest under section 84, and (*ii*) is bound to account for the gross profits under section 76 (i).

* *Madhavi* v. *Kunhi*, 23 Mad., 510.

The requisites of a valid deposit may thus be summed up : The deposit must be made (1) at a proper time, (2) in a proper Court, (3) by the mortgagor or any person entitled to institute a suit for redemption, (4) must be to the account of the mortgagee or his representative-in-interest, (5) must not be to the joint credit of the mortgagee and a third person, (6) must be of the full amount, otherwise it will not stop the running of interest, (7) the deposit must be unconditional, though sometimes a deposit *under protest* may be allowed.

N. B : The section provides a summary procedure for redemption on the lines of Bengal Regulations I of 1798 and XVII of 1806.

Cessation of interest on tender and deposit being made.

Sec 84. When the mortgagor has tendered or deposited in Court the full amount due on the mortgage, the interest will stop to run from the date of such tender or in the case of a deposit without previous tender as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of Court *and* the notice required by sec. 83 has been served on the mortgagee.

What is the effect of deposit in Court of money due on mortgage. All. 1926 (Ext.)

This rule is subject to the condition that in the case of a deposit *without* previous tender if the mortgagor subsequently withdraws the deposit money, interest on the principal money, shall be payable from the date of the withdrawal. It was held in 49 Mad, 619 that if after a reasonable time, the mortgagee who has notice of a proper deposit, refuses to take the deposit, there is still a presumption that the mortgagor continues ready and willing to pay, and the interest does not run even if the mortgagor withdraws the de-

posit money. But it is unreasonable to stop the running of interest in cases where the mortgagor takes back his money and derives benefit therefrom. The mortgagor cannot have both ways with his money and the law has accordingly been altered to supersede the case of 49 Mad. 619. It should here be remembered that if there was a previous tender, interest stopped running and subsequent withdrawal as aforesaid cannot cause interest run afresh, because the legal effect of mortgagor's tender and mortgagee's refusal causing cessation of interest is still present. But in the case of deposit without previous tender, it is the deposit that causes the cessation of interest and therefore when that deposit is undone by withdrawal, interest must necessarily run afresh. This accounts for the difference why withdrawal gives a fresh start to interest in one case but not in the other.

Proviso: Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money, *unless such notice has been given.*

Remember, therefore, that when there is a contract between the parties that a reasonable notice wlll be given to the mortgagee before payment or tender of the mortgage-money, there can be no present right to redeem until that notice has been served, and then tender or deposit will

not stop the running of interest. [*N. B.* Mortgagor in this section includes any person entitled to redeem.]

The Requisites of valid tender.

The Requisites of a valid tender : (1) A tender must be made after the principal money has become payable and before a suit for redemption is barred. (2) It must conform to the provisions of sec. 38 of the Contract Act, *i.e.*, to say, it must be unconditional and must be made at a proper time and place. (3) The tender must be of the full amount due. (4) It must be made in the currency of British India and not by a cheque or letter. (5) It must be made by the proper person, *i,e.* the mortgagor or any person entitled to redeem. (6) It must be made to the mortgagee.

N.B.—A tender under protest is valid.

The distinction between the right to redeem and the right to bring a redemption suit. B. L. 1895.

It may here be incidentally noticed that the right to redeem and the right to bring a redemption suit are not exactly co-extensive. The right to redeem *may* exist even when the right to bring a redemption suit has been barred by a preliminary decree. Thus, a mortgagee obtains the usual preliminary decree against the mortgagor for an account of what is due under the mortgage, for payment thereof on a certain day, and in default, for foreclosure. No payment is made on the appointed day and the mortgagee takes possession of the mortgaged property without previously applying for a decree absolute. Here the mortgagor's right to redeem is not absolutely lost, though he may not enforce it by a separate redemption suit. He may exercise his right of redemption by depositing the amount (settled under the preliminary decree) into Court, or paying it out of Court to the decree-holder.

Sec. 91. Who may redeem or sue for redemption: Besides the mortgagor the following persons can redeem or institute a suit for redemption.

Who are entitled to redeem a mortgage? B. L. 1911 (Jan.) 1916 (July.) 1919 (July.) 1926 (Jan.) 1929 Jan.) 1931 (July.) All. 02.

(1) any person having an interest in or charge upon the property, *i.e.* the mortgage security (any person does not include the mortgagee);

(2) any person having any interest in or charge upon the right of redemption;

(3) any surety for the payment for the mortgage debt or any part thereof.

(4) any creditor obtaining a decree in an administration suit for sale of the mortgaged property.

The mortgagor has the right of redemption in the first instance. We have seen that the right of redemption is an 'estate.' Now, all persons to whom this estate passes or who acquire a right to an interest carved out of this estate have the right to redeem. But an obvious exception is made in the case of the mortgagee (sought to be redeemed) having an interest in or charge upon the property. The interest which entitles a person to the right of redemption must be obtained directly or indirectly from the mortgagor and must be a *present* interest. Thus, a lessee from the mortgagor can redeem, but a Hindu reversioner who would be entitled on the death of the widow cannot sue to redeem as he has no *present* interest, 30 All., 497. A mere right to maintenance creates no charge on the property and so does not entitle a person to the right of redemption. As an attach-

A Hindu widow's reversioner cannot sue for redemption while she is alive. B. L. (Int.) 1926 (Jan.) 1927 (Jan.) 1929 (Jan.)

ment creates no interest in the property (29 Cal. 428 ; 32 Mad. 429), a judgment creditor attaching the mortgagor's property is not entitled to redeem. A creditor obtaining a decree for the sale of the mortgaged property in an administration suit is however entitled to redeem : see cl. (4). A person having only an inchoate right may not redeem. The auction-purchaser of a second mortgage is entitled to ask for redemption of the first mortgage.* A partial owner of the equity of redemption is entitled to redeem the whole mortgage.†

When there are several mortgages on a property, all the subsequent mortgagees have the right of redemption ; and if two subsequent mortgagees of different dates enter into competition to pay off a prior mortgage, priority will be determined by the proximity of each competitor to the earlier mortgagee intended to be paid off. Thus, a second mortgagee is entitled to redeem the first mortgagee before the third, and the third before the fourh and so on.

Under cl. (1), a mortgagor's assignee has the right to redeem. Under sec. 59A., the term *mortgagor* includes his assignee, but as the mortgagor's assignee has been separately mentioned that shows that sec. 59A. has no application here.

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* *Radhakishun* v. *Hemchandra*, 11 C. W. N., 495.

† *Mirza Yadali* v. *Tukaram*, 48 Cal., 22=25 C. W. N. 241 (P. C.) ; also 22 C. W. N., 128-129 ; *Shankar* v. *Bhikaji*, 53 Bom., 353.

Subrogation : It is "the right of a person to stand in the place of a second creditor."—*Dr. Ghose*. In ordinary use of the word it means nothing more than mere *substitution*. We have seen that the mortgagee can transfer his mortgage-debt ; so when this debt is assigned to a person, the securities as the legal incidents thereof pass off to the assignee (see sec. 8). Or, in other words, the assignee becomes vested with all the rights of the mortgagee, *i.e.* he is substituted or *subrogated* in the place of the mortgagee. The doctrine of Subrogation is based on equitable grounds to be applied only where needed to accomplish the ends of justice. The question of *subrogation* becomes very important, when a property subject to two mortgages is purchased by a person, and the purchaser by paying off the first mortgage becomes subrogated to the position of the first mortgagee, because then the second mortgagee who has the right of foreclosing or getting rid of him as a mere purchaser, cannot altogether throw him out of the property, inasmuch the purchaser subrogated to the position of the first mortgagee is then entitled to say that the prior mortgage is a shield in his hand, and he cannot be got rid of unless the second mortgagee pays him his dues in respect of the first mortgage.

Write a short thesis on the equitable right of subrogation. B. L. (Int.) 1930 (July).

Illustrate the rule of Subrogation by reference to one leading decision. B. L. (Int.) 1917 (Jan.) 1920 (Jan.) 1924 (Jan.) 1924 (July).

"A prior mortgage is a shield in the purchaser's hand"—Develop. B. L. (Int.) 1921 (Jan).

Formerly, subrogation was allowed to take place either by act of parties or by operation of law ; that is, it was either (*a*) consensual (or conventional), or (*b*) legal. Both these kinds of subrogation have now been codified and dealt with in sec. 92. A consensual

or conventional subrogation arose when by agreement one party paid off another man's liability on the condition that he would be subrogated to the rights and remedies of the original creditor (whom he paid off), see the 3rd para. of sec. 92. The first paragraph of sec. 92 deals with what virtually may be called "legal subrogation"; it arises when a person entitled to redeem (other than the mortgagor) or a co-mortgagor, by redemption, gets into the position of the mortgagee. A person paying off a debt as a volunteer or in performance of his obligation or covenant, cannot claim subrogation, 14 C. L. J. 500.

Enunciate the equitable right of Subrogation. Who is entitled to invoke such a right and under what circumstances? B. L. (Int.) 1924 (Jan.)

It seems to have been held before that even the owner of the property himself, by paying off an earlier charge, can claim to come in before a subsequent incumbrancer, provided there was no personal covenant on the part of the owner to pay such subsequent incumbrancer.* But now the mortgagor has been distinctly denied the right of subrogation. "The benefit of subrogation may be claimed by any person who redeems a mortgage on an estate in which he is only partially interested,"—*Dr. Ghose.* If a stranger or a mere volunteer intends to take the benefit of subrogation by advancing money to the mortgagor to pay off a prior incumbrance, he must take an assignment of the mortgagee's securities, or he must enter into a distinct agreement for subrogation. "No person can safely lend money to a mortgagor to

B. L. (Int.) 1922 (Jan.)

* *Malireddi* v. *Adu Sumilli*, 47 Mad., 100=39 C. L. J. 204 (P.C.)

pay off a charge on the property without taking an assignment of the security. If he does not take this precaution, it is very likely he will be told that the loan was made simply with the object of clearing off the incumbrance, so as to let in an intermediate mortgage as a first charge on the estate—a view which must take the lender by surprise," though it must logically follow if he does not take an assignment of the security.

Can there be any right by Subrogation as against a mesne incumbrancer when a subsequent incumbrancer pays off a substantial portion but not the whole of a prior mortgage, the balance being afterwards paid by the mortgagor? B L. Int.) 1914 (July).

In order to be entitled to subrogation a person must pay off the *entire* amount of a prior mortgage, because subrogation takes place by redemption, and unless there is redemption, there can be no subrogation. If a person could claim subrogation by *part* payment of a prior mortgage, the result would be that he would occupy the position of a joint mortgagee with the person whose claim is partially satisfied or with some other puisne mortgagee who pays off the unpaid balance of the said prior mortgage. So it has been laid down in *Gurdeo* v. *Chandrika*, 5 C. L. J. 611—"Before one creditor can be subrogated to the rights of another, the demand of the latter must be *entirely* satisfied, so that he shall be relieved from all further trouble, risk and expense." Also see Harris on *Subrogation*, sec. 29. But where a subsequent incumbrancer pays off a substantial portion, though not the whole of a prior mortgage, and the balance is afterwards paid by the mortgagor, it may be asked whether a claim for subrogation is allowable. If the rule of payment of the *entire* amount be an inflexible one, then even in such a case, there can be no subrogation.

But we are apt to think that the rule against *part* payment has been formulated simply to avoid the anomaly of reposing the same right in two or more persons at the same time; but in the case contemplated above the unpaid balance being subsequently paid by the mortgagor himself and the subsequent incumbrancer paying off a *substantial* portion, there is no chance of a like anomaly. Besides, in this case there being complete redemption, it may eventually lead to subrogation. Provision in this direction has now been made in para 4 of sec. 92. All that the said clause requires is that the mortgage should be redeemed *in full*. It contains no reference to the manner in which *full* redemption is effected.

No subrogation when the man performs something which he is under an obligation to do.

Surjiram Marwari *v.* **Barhamdeo,** 2 C. L. J., 288: A person purchased a property which is subject to two mortgages and retains a portion of the purchase money for payment to the mortgagees; he pays off the first mortgage only, and not the second. *Held*, he cannot treat the first mortgage as kept alive to be used as a shield against the second, nor can he claim to be subrogated to the position of the mortgagee whose debt he has satisfied. The doctrine of Subrogation does not apply when a person simply *performs his own obligation or covenant*, and pays off a charge which he has undertaken, or is bound, to satisfy.

Har Shyam v. **Shyamlal,** 22 C. L. J., 227: A purchases a property subject to three successive charges, X, Y and Z with the full knowledge of their existence, and retains a portion of the purchase money with a view to satisfy the mortgages, Y and Z, but subsequently discharges the security Z: he cannot on satisfaction of the mortgage X, use it as a shield against the mortgage Y, which he has undertaken to pay off (following 2 C. L. J., 288, above).

Q. 1. Can there be any right by subrogation in the case of a purchase of the equity of redemption against a subsequent incumbrancer when the purchaser undertakes to pay off a prior incumbrance out of the purchase money? State reasons for your answer.—B. L. (Int.), 1914 (July) :—*Ans.* No subrogation : see 2 C. L. J. 288 and 22 C. L. J., 227 or 33 All 101 (F. B.).

Q. 2. X and Y are the first and second mortgagees on a property. Z is the third mortgagee on the same property, but when Z advanced his money a portion was utilised in satisfying the mortgage of X. Can Z claim priority over Y's mortgage? Discuss. B. L. (Int), 1926. (Jan.) : *Ans.* Mere payment to X, out of Z's money does not entitle the latter to subrogation ; there can be no subrogation in such a case in the absence of a distinct registered contract to that effect. Cf. *Dinobundho* v. *Jogmaya*, 29 Cal., 154 (P. C.) ; *Mohesh Lal* v. *Bawan Das*, 9 Cal., 961 (P. C.).

Marshalling and Subrogation are both intended to effect the same object, but in different ways — Explain and illustrate. B. L. (Int.) 1922 (Jan.)

⁂ *Marshalling and Subrogation are however closely allied to each other :* both being adjustment of the rights of different encumbrancers according to equity. Thus, for example, properties X and Y are mortgaged to A and then X is mortgaged to B; here B can compel A to resort to property Y in the first instance. This is marshalling. But if A satisfies his claim out of property X, B will be entitled to be subrogated in the place of A, for then, the sum obtained by A (out of X) for his satisfaction will be deemed to have been obtained from B. By reason of this fiction of B's subrogation to A's rights B gets from property Y what he loses in property X. By marshalling we keep aloof X for B ; or by subrogation, we make up B's loss in X by gain in Y. Therefore, we see that subrogation restores matters to their original condition and

thereby achieves the same object as marshalling would have done, though in a slightly different way; or in other words, *marshalling is subrogation in another shape.*

B. L. (Int.) 1931 (July).

Sec. 92. Subrogation : Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this Section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

Doctrine of Subrogation. B. L. (Int.) 1914 (July) 1924 (July) ad. 1912.

Statutory Subrogation : Sections 74 and 75 which were based on what is known as the law of *subrogation* have been omitted and this new section has been substituted in their place giving the law of subrogation a wider scope than before.

Now all persons who have an interest in the mortgaged property or in the right of redemption, *except the mortgagor*, have been given the right of being subrogated or substituted in the place of the mortgagee who is paid off. It is distinctly stated in this new section that *all* the persons referred to in sec. 91 (other than the mortgagor) and including a co-mortgagor can now claim the right of subrogation. Under sec. 59A 'mortgagor' includes the mortgagor's assignee *unless otherwise expressly provided.* Here is an express provision to the contrary and therefore the term *mortgagor* in this section does not include his assignee, who will in consequence have the right of subrogation. A surety is a person entitled to redeem under sec. 91 and therefore he will have the right to claim subrogation hereunder, when he pays off his principal's creditor. The surety's position has thus been scanned in *Craythorn* v. *Swinburn*, 14 Ves. 160 (162): "A surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security and all means of payment; to stand in the place of the creditor not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety'; having the right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor." The right of a co-mortgagor or one of several joint debtors to be subrogated to the security of the creditor, so as to enable him to recover from his co-debtors by means of such securities their pro-

portionate shares of indebtedness which has been discharged by him, rests upon the same equity as that of a surety or any other person entitled to redeem the mortgage; for each joint debtor is regarded as the principal debtor for his share of the debt and as the surety for the share of the debt which his co-debtor has got to pay (see Ghose on *Mortgage*, Vol. I., p. 371, 5th Ed.)

Illustrate the rule of Subrogation by reference to one leading decision. B. L. (Int.) 1917 (Jan.) 1920 (Jan.) 1924 (Jan.) 1924 (July).

Under the old sec. 74 the power of acquiring the rights of an earlier mortgagee by redemption belonged to a second or subsequent mortgagee; but it was held in cases that the principle of subrogation ought to apply generally to all cases other than those of a mortgagor who pays off his own debt or of a mere volunteer. It has been thus observed in *Bisseswar Prasad* v. *Lala Sarnam*, 6 C. L. J. 134 (137-38): "The doctrine of subrogation is a doctrine of equity jurisprudence. It does not depend on privity of contract, express or implied, except in so far as equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case, and on the principles of natural justice. While, therefore the doctrine will be applied in general wherever any person other than a mere volunteer pays a debt or a demand, which in equity or good conscience should have been satisfied by another, or where the liablity of one person is discharged out of a fund belonging to another, or where one person is compelled for his own protection or that of some interest which he represents,

to pay a debt for which another is primarily liable, or wherever a denial of the right would be contrary to equity and good conscience, the doctrine will never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities." It cannot, however, be laid down as a general rule that a person merely discharging a debt is entitled to the benefit of the mortgage. Obviously, a mortgagor himself who is liable to pay a debt contracted by him, or the transferee from such a mortgagor who has undertaken the liability, cannot claim the right of subrogation; nor can the application of the principle be invoked in favour of a mere volunteer (32 All., 25) as he has no right to redeem under sec. 91 and has necessarily no right hereunder. A stranger who pays off the mortgage debt not for his own protection or the preservation of his rights is a mere volunteer not entitled to subrogation. The real question in all such cases is whether the payment made by a person who is not in any way interested in the mortgaged property or the right of redemption was a mere loan to the debtor on his personal security, or whether it was made under an agreement that he should be substituted for the creditor. Such a stipulation for subrogation must be made by means of a *registered* instrument. In the absence of such a registered document the person making the payment will not be entitled to claim subrogation and will rank only *like a mere volunteer.* The section does not in terms exclude a transferee from the mortgagor undertaking the

"Subrogation as a matter of right is never applied in aid of a volunteer"—Explain. 1920 (July).

liability of paying off the mortgage, yet such a transferee cannot claim the benefit of the section for the simple reason that the amount paid by him in satisfying the mortgagee is really a part of the consideration for his purchase, and that being so, the payment is virtually on behalf of the mortgagor and therefore no question of subrogation can arise hereunder. Thus, where a subsequent mortgagee pays off a prior mortgage out of the money left with him by the mortgagor for the purpose, his payment would be not *qua* mortgagee, but as agent of the mortgagor and therefore there is no subrogation*. This is often expressed by saying that there can be no subrogation when he simply performs his own obligation or covenant, 14 C. L J. 500.

The last paragraph of the present section recognises the principle that there can be no subrogation unless the mortgage in question is paid off *in full*. For discussion of this principle *vide* notes at p. 325, *ante*.

Q. X and Y are the first and second mortgagees on a property, Z is the third mortgagee on the same property but when Z advanced his money a portion was utilized in satisfying the mortgage of X. Can Z claim priority over Y's mortgage?—Discuss. (Cal. 1926, Jan.)—**Ans.**: No Under the 3rd paragraph, a person advancing money with which a prior mortgage is redeemed will not necessarily be subrogated to the rights of that mortgagee, unless there is a stipulation to that effect in a registered instrument.

N.B.: Sec. 92 is not retrospective, 127 I. C. 889; 130 I. C. 556.

* See 2 C. L J. 288 or 33 All., 101 (F. B.), or 22 C. L. J. 227, below.

The English Doctrine of Tacking: The doctrine of "tacking" as obtaining in England is based on the equitable maxim "where there is equal equity, the law shall prevail", that is to say, when two men have equal equitable claims and one of them has in addition the legal estate, then the man with the legal estate will have a prior claim. Where there are three mortgagees over the same property of whom the first only has the legal estate and the third mortgagee has taken his security without notice of the second mortgage, such third mortgagee can acquire a preference over the second mortgage by redeeming the first mortgagee and taking delivery of his legal estate. Because by redeeming the first mortgage the third mortgagee gets an equal equity, and by taking the legal estate as well he acquires a priority on the strength of the maxim quoted above. Or, in the technical language a third mortgagee by acquiring the rights of the first legal mortgagee can *tack* his security to the prior security and insist on his security being first paid off; thus, he can unite the two mortgages and thereby *squeeze out* the intermediate mortgagee. This principle is commonly known as **Tacking**. It is immaterial for our consideration if the third mortgagee had any notice of the second mortgage at the time of his paying off the first mortgage. It will be enough if he *took* his security without such notice. From what has been said it is clear that tacking cannot arise where there is no distinction between legal and equitable estates. So, where law and equity are mingled together, priority will

Explain the doctrine of Tacking of Mortgages. All. 1900. Mad. 03, 13. Bom. 00, 02.

Compare the Eng. law of Tacking with the Ind. law: All. 1905.

be determined by priority in time (*Qui prior est tempore potior est jure*). In India, for example, where law and equity are administered together, the doctrine of tacking does not apply, and the mortgagees, here, take according to their priority. Sec. 93 which abolishes tacking runs as follows :—

Tacking abolished in India.

Prohibition of tacking. All. 1925 (Ext.)

Sec. 93. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security ; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

This section abolishes tacking by laying down that a mortgagee by paying off an earlier mortgagee does not acquire any priority in respect of his original security over an intermediate mortgagee. By reason of sec. 92 he is no doubt subrogated to the position of the earlier mortgagee, but in respect of his *original* security he acquires no priority by reason of such subrogation. The different mortgages rank only according to their priority in time. The section does not take into account whether the third mortgagee pays off the first mortgagee *with or without notice* of the second mortgagee. By making a reference to sec. 79, it is suggested that the Act permits *tacking* in one case, *viz*, in the case contemplated by sec. 79. That is, where a mort-

The only instance of Tacking in the T. P. Act.

"In India, the

Legislature has abolished tacking by special provisions in T. P. Act." Is there any exception to the general rule? Illustrate. B. L. (Int.) 1916 (Jan.) 1928 (Jan.)

gage is made to secure future advances up to a certain maximum limit, there is a priority for all the advances up to that limit; but where *no maximum is fixed*, the mortgagee gets no priority over a subsequent mortgagee in respect of the advances made after such subsequent mortgage (p. 303). But we have pointed out that sec. 79 virtually lays down what would be a corollary to the general law relating to mortgages and no principle of tacking. Something like the principle of tacking is allowed in a case where the *heir* of a mortgagor or some other person becomes liable for the mortgagor's debts by reason of possession of his (mortgagor's) property. The mortgagee is allowed to tack, as against the heirs, an unsecured debt to a debt secured by a mortgage. The mortgagee may insist on being paid even the unsecured debt before the mortgagor's heir can redeem. The T. P. Act makes no provision for such a case, nor is it founded on any principle of equity but "is allowed merely to avoid circuity of action." In *Ragho Govind* v. *Bhalvant*, 7 Bom., 101, the plaintiff seeking to redeem the mortgagor's property was called upon to pay off an unsecured debt over and above the debt secured. In that case there was only one creditor. But where there are many creditors one creditor is not however allowed to tack his unsecured debt to a secured debt so as to affect the interest of a mesne incumbrancer. Besides, it should be noted that this sort of tacking is allowable only against the mortgagor's heirs or against the persons who have become liable for the mortgagor's debt but

not against the mortgagor himself. Thus, a mortgagee cannot add his unsecured debt to a secured debt, though he might *agree* with the mortgagor to postpone his right of redemption until the payment of such unsecured debt (*Krishnaji* v. *Maheswar*, 20 Bom., 336).

Consolidation and Tacking compared. Mad. 1913. Bom. 1902.

The Distinction between Consolidation and Tacking : The doctrine of consolidation depends upon a principle altogether different from that upon which the doctrine of tacking is founded. Because, in tacking, the right is to throw together several debts lent on the same estate, and to do so under the priority and protection afforded by the legal estate under the maxim, "where there is equal equity, the law shall prevail"; but in consolidation the right is to throw together on one estate several debts lent on *different* estates and to do so *without reference to any priority or protection afforded by the legal estate* but solely upon the equitable maxim that "he who seeks equity must do equity." Further, not only is the possession of the legal estate not necessary as a preliminary to consolidation as it is to *tacking*, but even *notice at the time* of lending the mortgage money on the second estate, which would be fatal to any subsequent right of tacking is wholly immaterial as regards the right of consolidation; see Fisher on Mortgages at p. 618.

Rights of mesne mortgagees.

Sec 94. Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees

posterior to himself as he has against the mortgagor.

When there are several mortgages on the same property all the mortgages are not on the same footing. After the first mortgage the only interest in the property that remains with the mortgagor is his equity of redemption ; now the equity of redemption being an immoveable property (*Kantiram* v. *Kutubuddin*. 22 Cal. 33) it can be mortgaged for a second time (see p. 225, *ante*). So, in a subsequent mortgage what is practically mortgaged is the right of redemption that rests with the mortgagor after a prior mortgage. Therefore, under sec. 91 (a) such a subsequent mortgagee has the right to redeem the prior mortgagee, just as the original mortgagor can redeem him and on such redemption he is under sec. 92 subrogated to the position of the prior mortgagee he redeems. If the mortgagee thus redeemed is next prior to him, he virtually steps into his shoes. In this way every mesne mortgagee can go on redeeming the prior mortgages one by one until he becomes himself the first mortgagee. Under this section a mesne mortgagee has the same right against a posterior mortgagee as he has against the mortgagor. That is, he can bar the posterior mortgagee's right of redemption by foreclosure or sale. Therefore, an intermediate mortgagee who by gradually redeeming the prior mortgages attempts to get an absolute estate, must foreclose all the subsequent mortgagees, otherwise, any of these subsequent mortgagees may in their turn redeem

State the position of a mesne mortgagee as regards the mortgagor and the first mortgagee. Cal. 1879. All. 1905.

him and thereby defeat his purpose. This principle has been summmed up in the maxim, "Redeem up and foreclose down."

Illustrate what is meant by saying that a mesne incumbrancer has to "redeem up and foreclose down". B. L. 1912 (Jan.) 1923 (Jan.) 1924 (Jan.) 1925 (Jan.) 1928 (Jan.) All. 1906. Mad. 1909. All. 1921. All. 1924. All. 1925. All. 1927, (Int. and Ext.)

Under sec. 91 a mesne incumbrancer can redeem any of the prior mortgagees and not only the mortgagee *next* prior to him. When there are several mortgagees it is not incumbent on the mortgagor to redeem them all together, he may first pay off any one mortgage he likes without paying off the rest, *Mackintosh* v. *Watkins*, 1 C. L. J. 31; that is, he can redeem any one of the mortgages without making the least reference to any of the other mortgages. Similarly, any intermediate mortgagee can at his option redeem any of the mortgagees over him leaving out other intervening puisne mortgagees unredeemed. He cannot, of course, squeeze out the unredeemed puisne mortgages because he cannot by reason of section 93 tack his own mortgage to the one he redeems. An intervening puisne mortgagee cannot take exception to the redemption of a superior mortgage by a subsequent mortgagee posterior to him, because such redemption cannot operate to his prejudice, but on the other hand, by reason of such redemption his security is virtually enhanced. If the doctrine of tacking had prevailed the position of puisne mortgagee would have been precarious as a posterior mortgagee by stealing a march over the puisne mortgagee would redeem an earlier mortgage and squeeze him out. But tacking being prohibited by sec. 93, that course is not possible in this country. It may here be noted that

What are the respective rights of the puisne mortgagee and the prior mortgagee. All. 1925.

when a subsequent mortgagee seeks to redeem a prior mortgagee, he ought first to foreclose, or get rid of by sale, all the incumbrancers posterior to him up to the equity of redemption, inasmuch as in case of his omission to do so, any of the posterior mortgagees may in his turn bring a like redemption suit subjecting the superior mortgagee to a multitude of redemption suits which the law can scarcely allow.

It may sometimes happen that a subsequent mortgagee, in ignorance of an intermediate mortgage, will redeem a prior mortgagee ; here, though the redeemer cannot tack his own mortgage so as to squeeze out the intermediate one, still he acquires the rights of the paid-off mortgagee: "Where the third mortgagee in ignorance of the second mortgage, pays off the first mortgagee, *in the absence of fraud*, he acquires all the rights of the first mortgagee, and which he can use as a shield against the second mortgagee seeking to enforce his mortgage.—Dr. Gour's *Transfer of Property*; p. 917. This has been distinctly laid down in sec. 92 and the following example (*Gangadhara* v. *Shivaram*, 8 Mad., 246) will illustrate the point:

"A prior mortgage is a shield in the purchaser's hand."— Develop B. L. (Int.) 1911 (Jan.)

B. L. (Int.) 1916 (July).

***Ex.*: A mortgaged some lands successively to B, C and D. D paid off the amount due to B under his mortgage. Later on C instituted a suit upon his mortgage bond, against A and D, and prayed for a decree for sale. What should be the directions in the decree in regard to the distribution of the sale proceeds against A, C and D? (B. L. Int.—1916, July).—*Ans.* Here D becomes entitled to the remedies of B; therefore, out of the sale proceeds, the mortgage amount of**

B should be first paid to D ; then C should get his amount ; then D should again get the amount of his own mortgage, and the balance, if any, should go to A, the mortgagor.

Where a suit on a prior mortgage is brought without impleading the puisne mortgagee and decree and sale follow, the puisne mortgagee's right to redeem remains unaffected, *Ibrahim Hossein* v. *Ambica prosad*, 39 Cal., 527 = 15 C. L, J. 411. Where a prior mortgagee has acquired the equity of redemption and seeks to redeem the puisne mortgage and the puisne mortgagee in his turn seeks to redeem the prior mortgage, the prior mortgagee will be given the preference, as he holds the equity of redemption, *Ram* v. *Bhagwati*, 47 All. 751 ; see the following question.

Q. A makes a mortgage in favour of B and again mortgages the same property to C. B brings a suit on his mortgage without impleading C and purchases the equity of redemption. C, then sues to redeem B. Is it open to B to say that he may be allowed to remain in possession of the property on payment of the money due to C ? (All. 1925)—*Ans* : Yes, as both the mortgagees here have mutual right of redeeming, B's claim will be preferred as he holds the equity of redemption.

Right of redeeming co-mortgagor to expenses.

Sec 95. Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-motgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.

Right of Redeeming Co-Mortgagor to Expenses: Under sec. 92 a co-mortgagor redeeming the entire mortgage has been allowed the right of subrogation (Cf. *Haraprasad* v. *Raghunandan*, 31 All. 166). We have seen at p. 225 that a mortgage debt being indivisible has to be redeemed in its entirety or not at all; so, it is not possible for a co-mortgagor to redeem the mortgage proportionately to his share; but he has to redeem the entire mortgage and upon such wholesale redemption he steps into the position of the mortgagee and can enforce his claim for reimbursement in respect of the shares of mortgage-dues of the other co-mortgagors as if he were the mortgagee himself, that is, instead of suing his co-mortgagors for contribution he can realise his dues from them by putting up the mortgaged property to sale, see 27 C. L. J. 110; 14 C. L J. 639; 35 C. W. N. 409=53 C. L. J. 154, F. B. The redeeming co-mortgagor is also entitled to recover proportionate shares of his costs of redemption from his co-mortgagors; and this section authorises him to add his costs to the mortgage-money and recover the same from the co-mortgagors in proportion to their shares of liability.

Subrogation by a redeeming co-mortgagor, 31 All. 166.

Co-mortgagor's charge when he alone redeems. Mad. 1915.

The section does not however apply when the co-mortgagor pays only a part of the mortgage-debt, as no redemption is then effected and therefore there is no subrogation. Nor does this section apply when there is a severance of the liability at the very outset, because this section does not contemplate the case in which the liability is

already apportioned between the different mortgagors.

It is not necessary for the applicability of this section that the redeeming co-mortgagor should get possession of the property he redeems, see *Malik Ahmad* v. *Shamsi, Jahan Begum*, 31 I. A. 81 (10 C. W. N. 626=3 C. L. J. 481, P. C.)

Mortgage by deposit of title-deeds.

. **Sec. 96.** The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.

Rights and Remedies under Equitable mortgages: This new section provides that a simple mortgage and an equitable mortgage (*i.e.* a mortgage by deposit of title-deeds) stand on the same footing as regards the rights and remedies of the parties.

Q. A mortgage decree having been passed against several co-mortgagors, one of them pays the decretal amount and redeems the entire property. Upon what principle is the latter entitled to claim contribution from his co-mortgagors. Is he entitled to claim a charge on the property for contribution ? State your reason :—B. L, (Int.), 1917 (August)—*Ans.* : *Vide* above ; 31 All., 166.

What mortgages are designated as anomalous mortgages ?

Sec. 98 : Rights and liabilities of parties to Anomalous Mortgages : In the case of an *anomalous* mortgage the rights and liabilities of the parties shall be determined by their contract evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

What provision has the T. P. Act made to determine the rights and liabilities of the parties to such mortgages? Bom. 1916.

In the case of an anomalous mortgage, contract between the parties, and in the absence of specific, contract, local usage are the sole guide, if not in any way affecting the right of redemption under sec. 60; see 35 C. L. J., 468 (P. C.).*

Charges.

Sale, Mortgage, Charge.

In a *sale*, all the rights of the vendor in respect of the property sold are transferred to the purchaser. In a *mortgage* an interest in the mortgaged property (this interest is different in different mortgages) is transferred to the mortgagee. In a *charge* no such interest or right is transferred; it simply creates a lien in favour of a person to be satisfied out of a particular property.

Define "Charge." B. L. (Int.) 1915 (Jan) 1930 (July) All. 03. Mad 06.

When is a person said to have a charge on a property? B. L. (Int.) 1931 (July).

Sec. 100. Charge defined: When immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and *the transaction does not amount to a mortgage*, the latter person is said to have charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

From the definition, we realise that a 'charge' is a wider term than a mortgage. It is a generic term of which a mortgage is but a class. When a transaction amounting to a charge falls under the special heading of a mortgage, it is governed by the rules of Mortgage; but when it does not so come under the heading of a *mortgage*, it is a *charge pro-*

* See 43 Mad., 589; 39 C. L. J. 269=28 C. W. N. 532.

per. Section 100 deals with what is here called a *charge* proper.

Give illustrations of charges arising by act of parties and by operation of Law. Bom. 1899.

Charges may be created (1) by the act of parties or (2) by operation of law. A charge when created by the act of parties (*e.g.*, created by an instrument *inter vivos* or by will) comes very near a simple mortgage so that it then becomes more than a mere academic interest to distinguish between the two. Now, it has been clearly laid down that all the provisions of law which apply to a simple mortgage shall so far as may be, apply to a charge; therefore the rights and liabilities of the parties to a charge are very much similar to those of the parties to a simple mortgage. As in a simple mortgage, so in the case of charge too, the debt may be severed from the security.* When a charge is created by a non-testamentary instrument, the law of Registration must apply, of course, where no writing (*i.e.*, instrument) is used, no question of registration arises and there is nothing in law to prevent the creation of an *oral* charge. A charge created by a decree also does not require registration. To create a charge (by act of parties) no particular form of words is necessary. (Cf. 28 Bom. L. R 939). A common instance of a charge by the act of parties is when a property is charged for the maintenance or education of another or for other payments of money. When independent of the contract between the parties, a charge is created, in favour of one person, on the property of another as a consequence

(i) Charge created by act of parties.

* *Imperial Bank v. Bengal National Bank*, 54 C. L. J. 117 (P.C.)

(ii) Charge created by operation of law.

of the legal relationship between the two, it is said to be created by operation of law. Thus, (*a*) under sec. 55 (4) (*b*), a vendor has a charge on the property sold for his unpaid purchase-money, (*b*) a vendee has a charge under sec. 55 (6) (*b*) for advance payments. (*c*) rent is a first charge on the land; (*d*) an under tenure-holder preventing the sale of the tenure by depositing the rent acquires a charge on the tenure. Many other similar instances may be given, but they are simply too many to be all mentioned.

A co-sharer landlord paying the entire revenue in order to save the estate does not thereby acquire any charge on the shares of the other landlords. His remedy is by a personal suit for contribution. The maintenance of a Hindu widow is not a charge on her husband's estate unless it has been *made a charge* by the decree of a competent Court for a specific amount on such property. Or, in other words, in order to make such maintenance a charge available against a *bona fide* purchaser for value, an order of the Court has first to be obtained making it *definite*, *precise* and *enforceable*. A Mahomedan wife's right to dower is enforceable not as a charge but as other debts of the husband. "A Mahomedan wife, has no special charge on the property, but ranks *pari passu* with other creditors."—Dr. Ghose.

Charge v. Mortgage

The following points should be noted:

A charge and a mortgage compared. B. L. 1910 (Jan.)

1. A charge and a mortgage are alike in this respect that they both serve as a *security* for payment.

Distinguish between a "mortgage" and a "charge." B. L. (Int.) 1912 (July). 1916 (Jan.) 1917 (Aug.) 1922 (Jan.) 1922 (July). 1926 (Jan.). 1927 (Jan.). 1931 (July). Mad. 09, 12. All. 1927. (Int.)

2. A mortgage is a security for the payment of a *debt*, a charge is a security for the payment of *money* (such money may or may not be a *debt*). There may be a covenant to pay in a mortgage but not so in a charge.

3. The creation of a charge does not necessarily imply the existence of a debt but a mortgage does.

4. A mortgage may be security for the performance of an engagement giving rise to a pecuniary liability, but that is not the case with a charge.

"Define and distinguish between a mortgage and a charge" B. L. 1908. 1911 (Jan.) 1927 (July).

5. A charge does not operate to transfer to the charge-holder any interest in specific immoveable property as a mortgage does. It merely gives the charge-holder the right to have a claim satisfied out of a particular property without transferring that property to him. It is only under a decree for sale that an interest in the property is transferred in the case of a charge*; "There is this well-marked distinction between the two, that a mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property."†

6. A mortgage must be executed in respect of a *specific* property but a charge may be created "upon the wealth and property of a person" (*i.e.*, unspecified.)

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* *Tancred* v. *Delagoa Bay Co.*, 23 Q. B. D., 239; see also 35 Cal., 837.

† Per Mookerji J. in *Roysaddi* v. *Kritarthanath*, 33 Cal., 985 [4 C. L. J., 219].

7. A mortgage can only be made by act of parties, whereas a charge may arise either by act of parties or by operation of law.

8. A mortgage gives rise to a right *in rem* but a charge does not create any such right: the latter is available only against a *particular* set of persons, *i.e.* persons who are affected with notice of the charge. A mortgagee can follow his security into whosesoever hands it goes. A charge-holder cannot, while a mortgagee can, follow a *bona-fide* purchaser for value without notice.* A charge becomes *a right in rem* only when a decree has been obtained to that effect.

9. Thus, "a plea of purchase for value without notice may be a good defence against a charge, but will be wholly unavailing against a mortgage," 33 All, 28.

As between the charge-holder and the person subject to the charge, many of the provisions relating to mortgages can be applied. But there are no such things as redemption and foreclosure in a charge. The person subject to the charge can *pay off* the debt and extinguish the charge, and the charge-holder can sue for sale. A charge even when created by a decree can be enforced only by a suit.

Every defective and unenforceable mortgage is not to be regarded as a charge. Mad. 1910.

Under the English law, when a mortgage fails for want of some formality, the transaction may be valid as an equitable charge. So, when a security is intended to be created, it will take effect in some shape or other; if it fails as a mortgage owing to some technical defect it will be operative as a charge. Thus, a mortgage which fails because

* *Akhoy* v. *Corporation of Calcutta*, 42 Cal., 625=21. C. L. J. 177.

of improper attestation or from want of registration is transformed into a charge. But this equitable doctrine cannot be applied in India in the face of statutory provisions which make a charge a distinct kind of security as contrasted with a mortgage. A charge arises only when the transaction evinces an intention for creating it. It is not the necessary corollary of the invalidity of a mortgage. The words "and the transaction does not amount to a mortgage" in section 100 of the T. P. Act signify that if the relation created by the instrument is not that of a mortgagor and mortgagee and immoveable property has been made security for the payment of money, there is a charge on the property; they do not mean that if the transaction on the face of it purports to be a mortgage but the instrument is not operative *as such* by reason of defective execution or non-compliance with the formalities prescribed by the law, *i. e.* if it fails as a mortgage on account of some technical defects, the transaction is converted into a charge; 4 C. L J. 219; also 33 Cal., 985.

Can an instrument intended to be a mortgage, but failing for want of a formality be held to operate as a charge? 1920 (July). 1927 (July).

A mortgage deed which should have been registered is not registered. Can it operate as a charge? B. L. (Int.) 1930 (July). —No.

How is a security discharged? All. 1903.

Discharge of securities may take place (1) by payment of the debt, (2) by its deposit in Court, (3) by the creditor's releasing the security, (4) by novation, *i.e.*, by acceptance of a new security, (5) by limitation, (6) by the physical destruction of the property, (7) by Merger (sec. 101.)

The proviso to the section is important. It says that the section will not apply to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust

and that *save as otherwise expressly provided by any law for the time being in force*, a charge cannot be enforced against a transferee for consideration without notice of the charge. A trustee can reimburse himself for his expenses in the manner provided by sec. 32 of the Trust Act (II of 1882) and he is not bound to enforce his charge under this section. As a charge does not involve any transfer of interest it is but quite reasonable to protect a transferee for consideration without notice, see 9 All. 591 ; 13 All. 28 ; 33 Cal. 985 ; 42 Cal. 849 and 19 C. W. N. 37. The words in italics above, namely, "save as otherwise expressly provided by any law" are important. They show that a *bonafide* transferee for consideration without notice cannot have any protection where other rules of law have expressly provided that he will have no protection against any particular form of charge. For instance, absence of notice will not defeat the buyer's charge under sec. 55 (6) (b) of this Act or the widow's charge for maintenance declared by a decree (22 All. 326). A charge not being compulsorily registrable, registration of it will not constitute notice within the meaning of section 3.

Distinction between charge and lien : (1) A charge may be created both by act of parties and by operation of law, a lien arises only by operation of law. (2) A charge under this section can exist on immoveable property, but a lien can exist on both the kind of properties. (3) A charge-holder can satisfy his claim by selling the

property subject to his charge through the Court but a lien-holder satisfies himself by private sale or by retaining possession of the property : that is (4) a lien is possessory but a charge is not so. Instances of lien are agent's lien, attorney's lien and so on.

No merger in case of subsequent encumbrance.

Sec. 101. Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property ; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

No merger by reason of unification of mortgagee's or charge-holder's interest with ownership in property : This section abolishes what may be described as the doctrine of Merger. The old sec. 101, following the rule in *Toulmin* v. *Steere*, 3 Mer. 210, enacted that if a mortgagee or charge-holder of a property acquires the interest of the mortgagor or owner, his own mortgage or charge is extinguished, *unless he expressly reserves the continuance of such mortgage or charge or unless such continuance is for his benefit.*

The general principle of law is that when two estates in the same property become united in the same person, a *merger* results as a necessary consequence, that is, upon such unification of the two interests in the same person, the smaller interest is regarded as having merged in the bigger one. The doctrine of merger, as stated in an American case, springs from the fact that when entire equitable and legal estates are united in the same person there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he has been seised in fee simple. But if there is an outstanding or intervening title the case is different. It has, therefore, been expressly enacted in America that a mortgage is never merged if there is an outstanding incumbrance, see Jones *on Mortgage*, Vol. II., pp. 401-03, 7th Ed.. Thus, till very lately, the law in this country has been that when the owner of an incumbrance becomes the owner of the land*, or the owner of the land becomes a owner of the incumbrance, merger follows as a result unless the person 'intends to the contrary or his interest lies the other way'. When there was an express intention to keep the two interests separate there was no merger. Again, if it was for the benefit of the person to keep the two interests separate it was presumed that he intended to keep them separate. Thus, under the old law an intention express or presumed only could prevent merger upon union of two interests. The

* Read *Bhawani* v. *Mathura*, 40 Cal., 89=16 C. W. N. 985.

doctrine of *Toulmin* v. *Steere* has been variously commented on in different cases and it has been opined that the exception to the rule of merger on the basis of intention, actual or presumed, is not sufficient to meet the exigencies of Indian conditions; read *Gokuldoss* v. *Puranmal*, 11 I. A. 126 (133); *Malireddi* v. *Gopala*, 47 Mad. 190; also 10 I. A. 62; 29 I. A. 9 and 39 I. A. 68; 39 C. L. J. 204, P. C. The Legislature has accordingly felt that, as in America, it should be expressly enacted that there should be no merger in the event of a subsequent mortgage or incumbrance remaining outstanding and provision has accordingly been made in this section. Now, there is no question of intention, actual or arising from the doctrine of benefit, as an antidote to merger; if there is a subsequent mortgage or charge, there will be no merger and intention will play no part in the matter. That is the very existence of a subsequent mortgage or charge excludes the possibility of merger apart from the question of intention or benefit. It should be noticed from what has been said above that it is only when there are several incumbrances on a property that the question of merger or non-merger arises. If there be only one incumbrance, and the owner of the property acquires such incumbrance, or *vice versa*, it is immaterial for our consideration whether the charge is alive or extinguished. But when a prior incumbrancer acquires the owner's interest leaving behind an intermediate incumbrance, the question of extinction of his charge becomes pertinent. The section applies

both in the case of a mortgagee as well as in the case of a charge-holder ; so, the word "incumbrancer" has been designedly used here as that term covers both the cases.

Let us suppose that there are two charges on a property belonging to A. B, a purchaser of that property from A, pays off the first charge. Now, if it be supposed that the first charge has been extinguished (because of the incumbrance vesting in the owner of the land), the effect will be that the second charge-holder will get a priority over B, notwithstanding his acquirement of the first charge. Sec. 101 now expressly says, that there will be no merger in such a case. A merger on unification of interests is not prevented by this section if there is no subsequent incumbrance. For instance, the *solitary* incumbrancer on a property acquiring the owner's interest, creates a mortgage on the property. Here, he cannot say that his own incumbrance will prevail as against the newly created mortgage, because he being the *solitary* incumbrancer, merger resulted on his acquiring the owner's interest. Two estates may be united in the same person by act of parties or by operation of law, *e.g.*, by inheritance or devise. In whatever way the unification of estates may be effected, the result in the same so far as the question of merger is concerned.

There are two charges on a property belonging to A. B, a purchaser of the property from A, pays off the first charge. Can the second charge-holder get a priority over B? Discuss. B. L. (Int.) 1927 (Jan.)

It will not be out of place to point out that the principle enunciated in the foregoing pages is a mere repetition of the principle of subrogation. By paying off a prior incumbrance the person

Write a short essay on the doctrine of Subrogation with reference

to Gokul Das's case. B. L. 1910 (Aug.)

is subrogated to the rights of the prior incumbrancer and acquires a priority over the subsequent incumbrancer. Again, the above rule applies only when the prior charge is paid off by a person who is not personally and primarily liable for the debt. Thus, when the debtor himself (person primarily liable) pays off the first charge, he does not acquire any priority over the subsequent incumbrancers. The payment made by him amounts to *discharge.*

Notice and Tender. We have seen that notice in writing is necessary when the mortgagee exercises the power of sale under sec. 69 or when the mortgagor makes a deposit of the mortgage-money in Court under Sec. 83. Now the question is how to serve these notices. The general principle is that the notice should be directly served on the person affected by it, and if he does not reside in the district in which the mortgaged property lies, on the agent of such person, with a due power of attorney and residing in the district: Sec. 102 thus provides :—

Procedure for service of notice under Ch. VI and tender.

Sec. 102. When the person to be served with notice cannot be found within the district (in which the mortgaged property or some part thereof is situate) service or tender on or to an agent *holding* a general power-of-attorney from such person or otherwise duly authorised to accept such service or tender shall be deemed sufficient,

Where no person or agent on whom such notice should be served can be found or is known

to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient ; Provided that in the case of a notice required by sec. 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.

Where no person or agent to whom such tender should be made can be found or is known to the person desiring to make the tender, the latter person may deposit, in Court in which a suit might be brought for redemption of the mortgaged property, the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

N.B. This section lays down almost the same procedure for both *notice* and *tender*. Under the third paragraph of the section tender should be first made to the person entitled to the same, and in his absence to his duly-constituted agent and when neither the person nor the agent can be found or is known tender may be made by deposit in Court and such deposit will entitle the tenderer to the benefit of sec. 84 (cessation of interest). For tender see sec. 60; for notice of deposit, see sec. 83.

New Amendment :—This section relates to the service of notice on or tender to an agent of a mortgagee. In its old form it allowed the mortgagor to apply to the Court

for direction if the mortgagee or his agent could not be found *in the district* in which the property was situate. The effect of the use of the words "in the district" in the section was that even if the mortgagor knew the mortgagee's or his agent's whereabouts *outside the district*, he could apply to the Court for direction. The third paragraph of of the old section also contained a similar provision regarding 'tender.' In the present amended section the words "in the district" have been omitted in paragraphs 2 and 3 of the section and the effect of this is that unless the whereabouts of the mortgagee or his agent are *entirely* unknown to the mortgagor or unless the mortgagee or his agent cannot be found *anywhere*, the mortgagor should not be entitled to apply to the Court for direction.

The effect of the new proviso to paragraph 2 of the section is to make it clear that the application for the service of notice shall be made to the Court in which the deposit has been made and not to any other Court.

The effect of the change made in paragraph 3 is that the deposit is to be made in the Court in which a suit for redemption could be filed.

Sec. 103: Contemplates the case when the person, on whom or by whom the notice is to be served or when the person making the tender or accepting it, is incompetent to contract, and provides that in such a case a legal curator may be set up to act for such incapable person, and in the absence of such a legal curator, a guardian *ad litem* may be appointed for the purpose.

N.B. **In sec. 104**, a rule-making power has been reserved in favour of the High Courts. The reservation has ceased to be of any great importance after the passing of Act V of 1908 (Civil Procedure Code) and Act XXI of 1929 (T. P. A., Supplementary Amendment Act) which have repealed all the sections regarding procedure in mortgage suits.

CHAPTER V.

Of Leases of Immoveable property.

Sec. 105. Definition of Leases: A lease of immoveable property, is a transfer of a right to *enjoy* such property, made for a certain time express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered, periodically or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms.

'Lease' defined. How is a 'lease of immoveable property' defined in the T. P. Act? B. L. (Int.) 1912 (Jan.) 1915 (July.) 1916 (Jan.) 1928 (July). 1930 (July). 1931 (July).

N.B.—The 'price' is called the *premium* (সেলামি) and the money, share of produce or service rendered is called the *rent*; the transferor is called the *lessor* and the transferee is called the *lessee*.

It must be noticed that a lease is a right *in re aliena*, *i.e.* a right out of the whole bundle of rights, commonly called *ownership*. It is only the *right of enjoyment* that is transferred by such a lease. The right of the lessee in the leased property is good against all the world and is not affected by any subsequent transfer (whether by sale, mortgage or gift).

Define a 'lease of immoveable property.' B. L. (Int.) 1911 (July). Mad. (1907).

What are its essential features? B. L. (Int.) 1930 Nov.

The interest which the lessee acquires in the property is both transferable and heritable; so where a lessee dies before the termination of his lease, his representatives may step in his place and may sue the lessor or his successors for re-

covery of possession of the leased property or for re-instatement or damages for wrongful eviction. The term 'immoveable property' in the above definition does not refer to land only ; it includes all varieties of immoveable properties, as well as the incorporeal rights. The special characteristic of rent is that it is rendered periodically or on specified occasions.

Distinguish a *lease* from an *agreement for lease*. Can the latter be treated as a complete lease? B. L. (Int) 1930 (July).

Agreement for lease : It should be borne in mind that a contract to let and a lease are quite different things ; a contract to let just like a contract to sell, gives rise to no right *in rem.* It creates only a personal obligation which may be enforced by a suit for specific performance under, sec. 27A. (inserted in 1929) of the Specific Relief Act, provided the agreement to lease is in writing and is accompanied by delivery of possession. In this respect it materially differs from an agreement to sell. The latter agreement may be specifically enforced even if oral and unaccompanied by delivery of possession ; but not so with respect to an agreement to let or lease. A lease does, but an agreement for *lease* does not, establish the legal relationship of landlord and tenant between the parties. This is so because a lease is a *transfer* whereas an agreement to lease is not. The agreement to lease does not operate as an actual lease and does not affect the land.* If the agreement to lease be in writing and possession be delivered in pursuance thereto, sec. 53 A, will

* Read the P. C. case of *Hemanta Kumari* v. *Midnapur Zemindary Co.*, 47 Cal., 485=31 C. L. J., 298.

operate to enable the intending lessee to maintain his possession even if the document be not registered.* An agreement to lease if it creates an interest in *præsenti* and is not dependent on contingencies, requires writing and registration under the Registration Act, and therefore without such registration it will not be admissible in evidence, and virtually then the agreement to lease may be treated as a lease.

What is the distinction between a "lease" and a "license"? B. L. 1910 (Jan.) Mad. 97. All. 1927 (Int.).

*** *Distinction between Lease and License*: A license may be defined as "a right to do, or continue to do, in or upon th immoveable property of the grantor, something which would, in the absence of such right, be unlawful," such right not amounting "to an easement or an interest in the property," (see sec. 52 of the Easements Act, 1882). Thus, we see that in a lease some interest in the property is *transferred* to the lessee, while the licensee holds merely on sufferance without having any interest in the property. The interest of the lessee is not liable to be defeated by a subsequent transfer of the property, but licensee's position becomes precarious in such an event. The licensee cannot bring an action for trespass against a stranger but the right of the lessee is good against all the world. The lessee's interest is transferable as well as heritable but the licensee's right is not so. A lease cannot be determined before its time, that is, during its term except by mutual agreement while a

* The contrary view in *Ariff v. Jadunath*, 58 I.A. 91 = 35 C. W. N. 550 (P. C.) is no longer good law.

license is revocable at pleasure or at the option of the grantor. The death of either parties does not affect a lease but terminates a license. Where the right of user is restricted or limited both as regards time and manner of user the transaction amounts to a license and not a lease, 51 Bom. 274.

Duration of certain leases in absence of written contract or local usage. B. L. (Int.) 1928 (July).

Sec. 106. Duration of Leases: In the absence of a contract or local law or usage to the contrary a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee by *six months' notice* expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month terminable, on the part of either lessor or lessee, by *fifteen* days' notice expiring with the end of a month of the tenancy.

State the provisions contained in the T. P. Act for determining leases of immoveable property by *notice*. B. L. 1901.

Every **notice** under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or to be tendered or delivered personally to such party or to one of his family or servants *at his residence*, or (where such tender or delivery is not practicable) affixed to a conspicuous part of the property.

Agricultural and manufacturing leases are from year to year, and the other leases are

Thus, a lease may be determined by either parties after due service of notice. As to the duration of a lease, a statutory presumption is permitted. In the case of leases for agricultural or manufacturing purposes, the presumption will be

that they are from year to year; in the case of other leases the tenancy is deemed to be from month to month. In the former case a six months' notice is necessary for terminating the lease; in the latter, fifteen days' notice is quite enough. The notice is to expire with the end of a month or a year *of the tenancy* (and not of the calender). So if the tenancy commences on 16th of a month, the fifteen days' notice for a monthly tenancy is to expire on the corresponding date of another month.

from month to month.

It may here be incidentally mentioned that agricultural leases in Bengal do not ordinarily come within the purview of this 5th Chapter but are governed by the B. T. Act. and that this section will not apply to a tenancy created before the T. P. Act. (35 C. W. N. 1047).

But the local Government may, by a special notification, make some of the provisions of this Chapter applicable to the agricultural leases. See Sec. 117, *post*. It is only then that the foregoing rules apply to such leases.

The presumption of this section is subject to contract between the parties and to local laws or usages to the contrary.

The above statutory presumption as to duration arises only when there is no agreement between the parties or local usage to the contrary. The parties may at their option alter this presumed duration and may require the notice to be served in a peculiar manner. The parties may agree that the lease is to be for a particular term or is to be in perpetuity; they can also agree that a lease will be determinable by a particular mode of notice. So a stipulation for two months' or two weeks' notice may be quite valid When there is a peculiar law

or usage in a particular locality as to the duration of a lease or as to the mode of service of notice the presumption of this section cannot arise.

What are the requisites of a valid notice to quit? B. L. (Int.) 1914 (Jan.).

Requisites of Notice : (*a*) It must be in writing; (*b*) it must be signed by or on behalf of the lessor: (*c*) it must be delivered to the addressee personally or to one of his family or servants at his residence, failing which it must be affixed to a conspicuous part of the property: (*d*) its terms must be clear and unambiguous so that the tenant may safely and unhesitatingly act upon it: (*e*) it must be definite—"the notice must be explicit and positive. It must not give the tenant an option of leaving the premises or of entering into a new contract"—Story on 'Contract'; (*f*) there must be a *reasonable* certainty in the description of the premises and in the statement of *the time* when the tenant is to quit. (*g*) It must expire with the year or month of the tenancy.

By and to whom notice is to be given.

The **Notice** must be given by the party himself wishing to give it or his duly authorised agent. A notice given by an unauthorised agent will have no effect even if subsequently ratified by the principal. Notice by one of several co-parceners or co-sharers does not render the tenant liable to ejectment (31 Cal., 786). In case of joint-tenants, the notice must be served on each individual tenant.* The notice is to be given to the immediate tenant or his assignee and not to an under-tenant. If proper notice is not served the tenant may not quit the land and the suit for his ejectment will not lie. In the case of a tenant-at-will no notice is necessary but a verbal demand of possession will be quite sufficient.

Service of notice.

If personal service is not possible, the notice must be served on one of the family of the person

* *Bejoy Chand* v. *Kali Prasanna*, 29 C. W. N. 620.

to be served, or on a servant at his residence, or, if that is impracticable, affixed to a conspicuous part of the property. In case of personal service, the tender may take place anywhere; but the vicarious tender or delivery must take place at the residence of the party to be served.*

Notice may be served through the Post Office provided it is put in a cover *correctly* addressed, (7 C. L. J.. 251). There is a presumption, that the letter reached its destination at the proper time, according to the regular course of business of the Post Office, 46 Cal. 458 = 23 C. W. N., 77, (P. C.); see also (1906) 2 K. B. 82. Publication of the notice in a newspaper is not sufficient to determine the tenancy, (*Chandmal* v. *Bachraj*, 7 Bom., 574).

Ex. 1. A notice to quit was served on the 11th day of the month with the words "you are to quit within a month from the date," *held* it is not a valid notice to quit at the end of the current month. Examples.

Ex. 2. A (lessor) gives notice to B (lessee) on Jan. 2, 1898, that he is to quit the house on Feb. 6, 98. Is the notice good? (All., 1898.)—No; see Ex. 1.

Ex. 3. A notice given on 16th April to quit house within that month is not valid as it does not give fifteen clear days. But a notice given on 16th January is valid as January contains 31 days; see 20 C. L. J., 455.

Ex. 4. A dwelling house is let out at an annual rent of Rs. 200. In this case no statutory presumption as to the duration of a notice can arise, as this is not a lease for agricultural or manufacturing purposes nor is this a lease from month to month. Such a case is governed by English rulings which require a six months' notice for terminating the tenancy.

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* *Harihar* v. *Ram Sashi*, 23 C. W. N. 77 (P. C.)

Ex. 5. A, the lessee of a house, had it sub-let to a tenant. The lessor wishing to determine the lease served a notice on A's manager in the leased house; *held*, the notice is insufficient as not served *at A's residence.*

Ex. 6. A lease from year to year commenced with the 1st day of January. The lessee has not received before the 1st July 1930 any notice to quit, up to what date is the lessee secure from being ejected by notice? (Cal. 1931, July)—*Ans.*: up to 31st December of the next year, *i e.* 1931.

Leases how made. B. L. 1911 (July). 1915 (July). 1931 (July).

Sec. 107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument.

Formalities for making a lease. B. L. (Int.) 1928 (July).

All other leases of immoveable property may be made either by a registered instrument or by oral agreement coupled with delivery of possession. In the case of a lease by a registered instrument, or by two or more instruments, the instrument or each of the instruments must be executed by both the lessor and the lessee.

Proviso: The local Government will have the power to direct by notification in the local Gazette that all leases other than those described in the 1st paragraph of this section or any particular class of them, may be made by unregistered instrument or by oral agreement without delivery of possession.

Section 107 does not lay down that a lease of immoveable property should be made *only* by a registered instrument. This section says that a lease of immoveable property in three cases, *viz.* in the cases of (*a*) lease from year to year, (*b*) a lease for any term exceeding one year, and (*c*) a lease reserving a yearly rent, should always be made by a regis-

tered instrument, *Sarat Chandra* v. *Jadab*, 44 Cal., 214, S. C. 27 C. L. J., 198.

All other leases may be made either (1) by a registered Instrument, or (2) by an oral agreement accompanied by delivery of possession. That is to say, where actual delivery of possession is not given the lease must be made by a registered instrument. But the local Government will have the power to alter this law, i.e. it may direct that *such* leases may be made by (i) an *unregistered* document, as well as by (ii) an oral agreement *without* delivery of possession. This section does not apply to any grant or other transfer of land made by or on behalf of the Crown in favour of any person, *Secretary of State* v. *Nistarini*, 6 Pat. 446.

Formerly, there was a difference of opinion as to whether a lease should be executed by both the lessor and the lessee or need only be executed by one of them. The Allahabad High Court maintained that a lease should be signed by the lessor and that a unilateral document executed by a lessee (as in the case of a *kabuliyat*) alone could not constitute a lease (see 26 All., 368; 27 All., 190; 31 All., 276). This view was shared by the Madras and Calcutta High Courts in the earlier cases (30 Mad., 322; 32 Mad., 532; 14 C. W. N. 73), but was abandoned in Madras in 35 Mad., 95 and in Calcutta in 39 Cal., 1016. The Rangoon and Bombay High Courts have adopted the Allahabad view (3 Rang. 379; 27 Bom. L. R. 626). The Legislature, has, however, considered it desirable that a lease, containing, as it usually does, covenants both on the part of the lessor and lessee, should be executed by both of them. The above new paragraph introduces this principle. But it should be noticed that execution by both the parties is necessary only (i) where the lease is made by a registered instrument, or (ii) where there are more instruments than one. A lease which is not from year to year or which is not for a term exceeding a year or does not reserve a yearly rent may be made either (*a*) by a registered instrument or (*b*) by an oral agreement coupled with delivery of possession. In the case of Cl. (*a*), that is,

when made by registered instruments, even the leases for such shorter periods, as above, should be signed by both the parties. Or, to put the matter in a clearer form, we may say, that even in cases of optional registration, if registration is as a matter of fact resorted to, the document has to be signed by both the parties under this new amendment. Where more than one instruments have been executed to create a lease (for instance, where both a *pottah* and a *kabuliyat* are executed), each of the instruments has to be signed by both the parties irrespective of the question whether registration is compulsory or not.

The terms of a tenancy which does not come within sec. 107 can be proved by oral evidence, 27 C. L. J, 128. A lease for one year only, not reserving a yearly rent need not be in writing and the writing need not be registered even if the value of the property exceeds Rs. 100 provided there is delivery of possession.

A person holding under an unregistered lease where registration is compulsory cannot have better claims than a person holding under a *void* lease. He cannot sue for possession, nor can he *sue* or be sued on any covenant express or implied in the instrument ; but he may be sued for use and occupation.

N. B. It should be remembered that the provisions of this section do not apply to agricultural leases, *vide sec* 117, *infra.*

What are the statutory duties of a lessor? 1913 (July). Mad. 02.

Sec. 108. Defines the rights and liabilties which the lessor and the lessee possess or are subject to, in the absence of contract or local usage to the contrary, as against one another.

Rights and Liabilities of the Lessor :—

(*i*) The lessor is bound to disclose defects.

(*a*) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former

is, and the latter is not, aware, and which the latter could not with ordinary care discover :

(*b*) The lessor is bound on the lessee's request to put him in possession of the property :

(*ii*) The lessor is to deliver possession—either physically or symbolically.

(*c*) The lessor shall be deemed to contract with the lessee that if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

(*iii*) The lessor is bound to secure quiet enjoyment.

Rights and Liabilities of the Lessee :—

(*A*) *Rights* :—

(*d*) If, during the continuance of the lease, any accession is made to the property, such accession shall be deemed to be comprised in the lease : (This rule is subject to the law of Alluvion).

(*i*) The lessee has the right to enjoy accessions.

(*e*) If by any unforeseen event (not occasioned by the lessee) any material part of the leased property be wholly destroyed or rendered substantially and permanently unfit for the purposes of the lease, the lease shall, at the option of the lessee, be void ;

(*ii*) The lessee can avoid the lease in case of eventual destruction of the property.

(*f*) If the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expenses of such repairs with interest from the rent, or otherwise recover it from the lessor :

(*iii*) The lessee may deduct the costs of necessary repairs with interests.

(*g*) If the lessor neglects to make any payment which he is bound to make, and which, if

(*iv*) The lessee has the right to

deduct taxes and other similar payments made by him on behalf of the lessor or to recover them from the latter.

not made by him, is recoverable from the lessee or against the property, the leassee may make such payment himself and deduct it with interest from the rent, or otherwise recover it from the lessor :

(v) The lessee may remove trees, buildings etc., planted or erected by him, provided he does not impair the property by such removal.

(*h*) The lessee may even after the determination of the lease remove, at any time whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth, provided he leaves the property in the state in which he received it.

(vi) The lessee has the right to take emblements.

(*i*) When a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them ;

(*viii*) The lessee may mortgage or sublet his interest or any part thereof.

(*j*) The lessee may transfer, absolutely or by way of mortgage or sub-lease, the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it :

(*B*) *Liabilities* :

(*i*) The lessee is bound to disclose certain material facts known to him but unknown to the lessor.

(*k*) The lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(*l*) The lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :

(*ii*) The lessee is liable to regularly pay the contracted rent.

(*m*) The lessee is bound to keep, and, on the termination of the lease, to restore the property in as good a condition as it was in at the time when he was put in possession subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition ; and when such defect has been caused by any act or default on the part of the lessee, his servants, or agents, he is bound to make it good within three months after such notice has been given or left :

(*iii*) The lessee is bound to maintain and restore the property in the condition in which it was at the time of the lease.

(*n*) If the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with the lessor's right concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :

(*iv*) The lessee is to give notice of encroachments to the lessor.

(*o*) The lessee may use the property and its products as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased or fell or sell timber, pull down or damage buildings belonging to the lessor, or, work mines or quarries not open when the lease was granted, or commit

(*v*) The lessee may make only reasonable use of the property but cannot commit waste.

any other act which is destructive or permanently injurious thereto :

(*vi*) The lessee cannot raise a permanent structure except for agricultural purposes.

(*p*) He must not, without the lessor's consent, erect on the property, any permanent structure, except for agricultural purposes :

(*vii*) The lessee is bound to restore possession.

(*q*) On the determination of the lease, the lessee is bound to put the lessor into possession of the property.

Define the extent and nature of the duty of disclosure imposed upon (i) a lessor and (ii) a lessee in respect of the subject-matter of the lease. B L. 1910 (July). 1913 (July).

Cls. (*a*) and (*k*)—Before the lease has been executed it is the duty of both the lessor and the lessee to disclose certain facts regarding the leased property. The lessor is to disclose the *material* defects of which he is aware but the lessee is not and which affect the intended use of the property. Besides, in order to make the lessor liable the defects should be of such a nature as not to be easily discoverable by the lessee exercising ordinary care. Thus, where a house in a dilapidated condition is let out and the lessee takes the lease with his eyes open, he cannot make the lessor liable for the injury caused by the fall of the house. Moreover, he would not get anything even if he had taken the house without ascertaining its real state as there was nothing to preclude him from doing it. In order to make the leseor liable it must be shown that he had previous knowledge of the defects—unknown to the lessee. If the lessor and lessee both knew of the defects no action would lie. Omission to disclose defects is not however fraudulent ; but it is a mere breach of duty affording a ground for avoiding the contract. The obligation to disclose defects is not, again, equivalent to warranty which may be given irrespective of the knowledge of the parties concerned ; but the aforesaid obligation does not exist where both the parties have knowledge of the defects.

Q. A lets a house to B, knowing that it was in a ruinous state, and knowing that this was not known to B. B, in ignorance, takes possession, and the house collapses. What remedies, if any, would B have against A ? [Cal. (Int) ;

1922 (Jan.)]—**Ans** : If the defect was patent and discoverable with ordinary care, B has no remedy ; otherwise, he can rescind the contract or recover compensation, if he suffers any.

Cl. (*b*)—The next duty of the lessor is to put the lessee in possession of the property. When delivery of physical possession is not practicable, delivery of symbolical possession will do. Again, if the property be in the occupation of a third person, the lessor is bound to give notice to such person requiring him to attorn to the lessee. If possession be not delivered in time the lessee may resist an action for rent.

Cl. (*c*)—The lessor is also bound to secure quiet enjoyment of the leased property. There is an *implied* covenant in the lease that if the lessee performs his part of the duty, he will be permitted to hold the property *without interruption*. This implied covenant runs with the leased land and does not enure to the *personal* benefit of the lessee alone. Sub-clause (*c*) of this section is not happily worded. It seems that non-payment of rent or the breach of any covenant in the lease by the lessee will entitle the lessor to disturb the lessee's possession, *i. e.* to say, to evict him at pleasure. That would be placing a most formidable weapon and means of oppression in the hands of the lessor. The fair construction would be that, as long as the lease is subsisting, the lessor or his heirs will not be able to disturb the lessee's quiet possession. The covenant implied in this clause protects the lessee against disturbance by somebody claiming under a lawful title, (*i.e.* either claiming under the lessor or claiming under a title superior to that of the lessor), but it does not extend to disturbance by a trespasser, against whom the lessee must protect himself, *Nowrang Singh* v. *Janardan*, 36 C. L. J., 28.

Q. Does the following amount to a breach by the lessor of the covenant for *quiet enjoyment* to which the lessee is entitled ? Rent being in arrears, the lessor served notices on the sub-tenants of the lessee requiring them to pay rent

to him and not to the lessee, and refused to withdraw the notices on the request of the lessee. One of the sub-tenants actually paid rent to the lessor. What is the remedy open to the lessee ?

Ans : Yes, it is a breach of the covenant for quiet enjoyment : the lessee can sue the lessor for the loss he sustains and can suspend payment of rent.

Cl. (*a*)—If during the continuance of the lease any accessions be made to the leased property, it will be deemed to be comprised in such property. Accession in clause (*a*) includes all artificial additions, accretions by alluvion, or by other processes as well as an encroachment.

As to the law of *encroachments* made by a tenant, see 22 W. R. 246 ; "the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his land-lord is that the lands so encroached upon are added to the tenure, and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appears that the tenant made the encroachment for his own benefit." When the encroachment made by the tenant is on the lands of a stranger, the landlord will have the ultimate benefit ; so "if the tenant acquires a title to such land by adverse possession he acquires it for his landlord, and not for himself and he must therefore, surrender it on the expiration of his tenancy," 10 Cal. 820 ; (Shephard and Brown).

A took a lease of a house which is subsequently destroyed by an earthquake—What is A's remedy—A can avoid the lease. B. L. 1908.

Cl. (*e*)—The lessee may, in case of *entire* or *partial* destruction of the leased property by an act of God, avoid the lease. The lessee if he so chooses, may also recover a proportionate part of the premium paid by him at the time of the lease. If a portion of the land be acquired by the Government for public purposes, the tenant is entitled to abatement of rent for the same (*Uma Sankar* v. *Tarini*, 9 Cal., 57). The lessee cannot, however, avail himself of this rule if he himself has wrongfully or negligently contributed to the injury sustained by the property. As an illustration of *partial* destruction, see 17 Mad., 98 where the above principle was applied.

A person takes a lease of a coffee

to the lease of coffee plants, which having been destroyed by fire the lessee was held not liable to pay the rent assessed thereon. The notice avoiding a lease under sec. 108 (*e*) does not require any length of time for its operation and therefore, sec. 106 has got nothing to do with it. The lease becomes *ipso facto* void when the lessee serves the notice, *Damoda Coal Co.* v. *Hurmook*, 31 I. C. 627.

garden in which bushes are destroyed by fire, can he refuse to pay rent ? [See 17 Mad., 98.] B. L. 1913 (Jan.)

Cls (*f*) *and* (*g*)—The lessor is not necessarily bound to make any repairs in the property (38 C. L. J. 177)*. But if he undertakes to do the same he is bound to fulfil his promise, otherwise, the lessee will be allowed to do the repairs himself and deduct his costs with interest from the rent. He may recover his costs even by action, but he cannot avoid the lease. The lessee has a similar right with respect to the taxes and other payments for which the lessor is liable by the terms of the contract.

Cl h)—The lessee may, so long as he is in possession of the property even though the tenancy has come to an end remove all *fixtures*, whether ornamental (as pictures) or for the purposes of trade or manufacture (such as machineries. plants, sheds etc.) or agriculture, provided he leaves the property in the state in which he received it. But the property in trees growing on the land is vested in the proprietor of the land subject, of course, to any custom to the contrary (see 22 Cal, 742). Under the English law also, in certain cases, the "time of removal" has been held to extend to such further period of possession by the tenant, as he holds the premises under a right ancillary to his tenancy and this additional period has been described as *excresence* or *enlargement* of his term (see Foa on *Landlord and Tenant*, 6th Ed. p. 784). In connection with a house, fixtures mean something subsequently affixed to the premises after completion thereof and not forming part of the original structure, (*e.g.* Superstructures) *Boswell* v. *Crucible Steel Co.*, (1925) 1 K. B. 119. Under the English law "whatever is planted on the soil belongs to the soil", but this rule does not apply to this

* *Lakhmi Chand* v. *Ratanbi*, 51 Bom. 274.

country. The lessee is not at liberty to re-enter the property after once he has vacated it, for the purpose of removing his fixtures. It is immaterial whether the tenant vacated voluntarily or is compelled to vacate by process of law. Even if after the determination of the lease, the tenant is in wrongful possession of the property, he will have the right of removing the fixtures, although the landlord will have the power of recovering damages during the period of such wrongful possession. The fixtures may become the lessor's property as a result of stipulation (34 C. W. N. 785). The ruling of *Lala Beni* v. *Kundan*, (21 All., 496) does not help a lessee in removing the fixtures after he has parted with possession of the property on the ground that the improvements he has made are permanent and that the lessor had previous knowledge of the same.

Cl. (*i*)—As regards *emblements*, it is provided that when a lease of *uncertain* duration determines otherwise than by the *lessee's fault*, he, or his representatives may take all the crops planted or sown by him and growing on the property at the time of the determination of tenancy. The right of the lessee with respect to the 'emblements' exists only under the following conditions; (1) when the lease is of *uncertain duration*; (2) when the lease is determined by any means other than the *lessee's fault*; (3) when the lease terminates between the period of sowing and reaping the crops. So it may arise in a case where the lease determines under Sec. 111, Sub-sec. (*b*), (*c*) or (*h*) but not under any other sub-clauses of that section.

Power of lessee to transfer his interest. How and in what cases can a covenant prohibiting such transfer be enforced? B. L. (Int.)

Cl. (*j*)—The lessee has the power to transfer his interest in the property in whole or in part. But such power may be controlled by the lessor by inserting a clause to that effect in the lease, see under sec. 10, p. 38, *ante*. There, we have seen that a condition restraining alienation by lessee is valid if it be for the benefit of the lessor or of those claiming under him. When a lessee transfers his interest in contravention of the terms of his contract he

may be restrained by an injunction or may be sued for damages; but he cannot be ejected unless a right of re-entry is reserved. When the lessee transfers the leasehold estate, the covenant to pay rent runs with the land and the lessee'e transferee becomes liable to the lessor for the rent, because by the transfer, a *privity of estate* is established between the lessor and the lessee's transferee. Nothwithstanding the transfer, the lessee remains liable to the lessor for the rent because of his contract to pay rent to the latter. So the lessor can realise the rent either from the lessee because of the *privity of contract* or from the transferee because of the *privity of estate*, but not from both. *Cf* *Manmatha* v. *Nalinaksha*, 79 I. C. 557 (Cal.). As regards the devolution of the lessee's liabilities, the Act is not explicit. The lessee cannot, however, by a transfer, shift his liability to pay rent to a third person. It has been held in a recent case that the lessee's liability to the lessor lasts only so long as the privity of estate between him and the lessor exists, and no longer, (*R. D Metha* v. *Gadadhar Rai*, 21 C. L. J., 256); see also Mr. Foa's *Landlord and Tenant*, p. 427.

1912 (Jan.) 1914 (Jan.)

A, a lessee, transfers his lease-hold interest to B. Can the lessor sue A for rent? B L. (Int.) 1930 July).

How are the rights and liabilities of the lessor and the lessee affected by an assignment by the lessee of his interest under the lease? Mad. 1915.

Cl. (*l*)—As regards the lessee's liability for rent, it is regulated by the terms of the covenant. If the lessor fails to give full effect to the lease, the lessee can claim a proportionate abatement of the rent. The tender of the rent must be unconditional and not under protest. It must also be at the proper time and place. It must be made to the landlord himself or his authorised agent and must be in the currency of the country. Payment or tender to one among many co-lessors (jointly entitled to the rent) is a valid discharge against all.

Cl. (*m*)—The lessee is bound to maintain and restore the property in the condition in which it was leased to him. But he is not liable for any injury caused to the property by reasonable wear and tear or by the irresistible force which he could not prevent by his diligence.* Mere non-occupa-

Lessee's liability to restore possession to lessor. Is the liability qualified in

* See 51 Mad. 994.

any manner by reason of lessee's not having possession of some of the leasehold properties? B. L. (Int.) 1914 (Jan.)

tion of the leased property is no plea for a lessee to absolve himself from such liability, As to the lessee's liability in respect of the additions made since the lease, see 32 C. W. N. 154=46 C. L. J. 607. The lessee's liability to restore possession or for eviction after the expiry of the term of the lease cannot be avoided by a plea of (equitable) estoppel that he has erected permanent structures and that all the time that he was making the constructions, the lessor had full knowledge, but he stood by without taking any exception thereto (see *Beniram* v. *Kundan Lal*, 21 All. 496, P. C.). Thus, A lets land for cultivation to B for twenty years, B erects a cotton grinding factory on the land. A becomes aware of the erection but takes no objection. Is B entitled to maintain the factory after the expiry of the term of the lease? B. L., (Int.), 1912 (July)—No. B cannot take advantage of Sec. 51 of the T. P. Act to claim the value of his improvements as he could not believe in *good faith* that he was *absolutely* entitled to the property (see Sec. 51, p. 122, *ante*).

Beniram v. *Kundan Lal* B. L. (Int.) 1912 (July). 1929 (Jan.) All. 1921.

Cl. (*n*)—A tenant is bound to notify to the lessor all encroachments by strangers on the leased property. If he fails to do so the lessor's right is not in any way affected by the encroachment. For example, when the tenant is dispossessed by a trespasser, time does not begin to run against the landlord till the expiry of the lease.

Ex. 1. A lessee is ousted by a stranger during the subsistence of the lease; can the lessor enter into possession at once by ejecting the stranger?—No, here the stranger's possession is adverse to the lessee and not to the lessor, or such possession does not amount to his ouster till the expiration of the lease.

Lessee's right to timber and mines on the property? B. L, (Int.) 1912 (Jan.)

Cl. (*o*)—The next duty of the lessee is to exercise ordinary prudence in the enjoyment of the property; he must not use it for a purpose other than that for which it was leased. Thus, the lessee cannot build on, or excavate, the land let out for agricultural purposes. The lessee should

not himself commit any waste on the land, nor permit any one else to do the same. He must not do such acts as felling or selling timber, cutting shrubs, pulling down houses *belonging to the lessor*, working mines and quarries not hitherto opened. The prohibition against felling timber applies only to timber that stood on the land at the time of the lease, *Kedarnath* v. *Govinda*, 32 C. W. N. 366.

Cl. (*p*)—The lessee has no right to erect any permanent structure on the property except for agricultural purposes. If he attempts to raise any *pucca* structure he may be restrained by an injunction.

The last duty of the lessee is to restore possession of the property to the lessor on the determination of the lease. If there be any sub-lessee on the property wrongfully holding over and refusing to quit, the lessor may recover from the lessee special damages as well as the costs of ejecting the sub-tenant.

"Personal or collateral contracts between lessor and lessee which do not concern the thing demised do not pass." Comment. B. L. (Int.) 1926 (Jan.)

What is meant by the term *covenant running with the land*? "Covenants that touch and concern the land comprised in the lease as distinguished from those which are collateral thereto are said to run with the land. Such a covenant may be express or implied, affirmative or negative. Among such covenants the burden or benefit of which passes to the transferee of the lessee are on the one hand, covenants by the lessor to repair, to renew the lease, and, on the other hand, covenants by the lessee to pay rent, to repair, not to sub-let or assign without notice"—Shephard and Brown, 7th Ed., p. 400.

The learned authors seem to have borrowed the proposition of law in the above Quotation from the rule in *Spencer's* Case (1 S. L. C. 11, Ed., p 55.) But the rule in Spencer's case has been considerably modified by recent decisions. Now covenants are divided into two classes—(*i*) negative and (*ii*) affirmative and the latter are not allowed to run with the land; see the cases at pp 101-02; also 48 All., 787. N. B. The covenant for quiet possession in Cl. (*c*), and the covenant to pay rent, run with the land.

Rights of lessor's transferee.

Sec. 109. If the lessor transfers the property leased, or any part thereof, or any part of his interests therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and if the lessee so elects, be subject to all the liabilities, of the lessor, as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Proviso: The transferee is not entitled to arrears of rent due before the transfer, and that if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee, and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

It must be noticed that the lessee's right is not in the least affected by the lessor transferring his interest to another. Notwithstanding the transfer of his interest, the lessor does not cease to be subject to the liabilities which attach to him because of the *contract* of lease. But the lessee, if

he so elects, may exonerate the lessor from the liabilities and may hold his transferee answerable to him. As soon as the lessor has so elected *privity of estate* is created between the transferee and the lessee leaving out the original transferring lessor. If the lessee has no notice of the transfer and makes payment of rent, falling due after the transfer, to the lessor, in good faith, he shall not be liable to pay such rent over again to the lessor's transferee. This rule holds good as between the tenant and the landlord's transferee. But the landlord is answerable to his transferee for his improper or unauthorised receipts.

According to the third paragraph of the section, when a question of apportionment arises between the transferor, the transferee and the lessee, it must be determined with the consent of all of them and in case of disagreement the determination may be made by a competent Court.

Sec. 110. Computation of Leases : Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time

commences ; see 17 C. L. J. 167. Thus, a lease for two years commences on 16th July, 1931 ; it will subsist during the whole of the 16th July, 1933.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

In what ways may a lease be determined? B. L (Int.) 1912 (July.) 1928 Jan.) 1930 (Nov.) 1931 (July.) Mad. 05. All. 1922 All. 1923. All. 1925 (Int. & Ext.)

What are the several modes in which a lease of immoveable property determines? B. L. 1907. 1921 (July). 1923 (Jan.) 1925 (Jan.)

Sec. 111. Determination of lease : A lease of immoveable property determines—

(*a*) By *efflux* of the time limited thereby :

(*b*) Where such time is limited conditionally on the happening of some event—by the *happening* of such event :

(*c*) Where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the *happening* of such event :

(*d*) In case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the *same right* :

Enumerate the grounds on which leases may be determined. B. L. (Int.) 1926 (Jan.)

(*e*) By *express surrender, i.e.* in case the lessee yields up his interest under the lease to the lessor *by mutual agreement* between them :

(*f*) By *implied surrender* : for instance, when the lessee accepts from his lessor a new lease of the leased property, to take effect *during the continuance of the existing lease* :

Under what circumstances does a lease

(*g*) By *forfeiture* ; *i.e.* (1) in case the lessee breaks an express condition which provides that

on breach thereof the lessor may re-enter ; or (2) in case the lessee renounces his character as such by setting up a title in a third person, or by claiming title in himself or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event, and in any of these cases, the lessor of his transferee gives notice in writing to the lessee of his intention to determine the lease ;

of immoveable property determine? B. L. (Int.) 1927 (Jan.)

(*h*) On the expiration of a notice to determine the lease, or to quit or of intention to quit the property leased, duly given by one party to the other.

Recapitulation : A lease is determinable (1) by efflux of the time of its duration : (2) by the happening of the contingency : (3) by the happening of the event which terminates the lessor's interest ; (4) by merger : (5) by express surrender : (6) by implied surrender : (7) by forfeiture resulting from—(*a*) the lessee's breaking a condition or (*b*) from his denial of the lessor's title ; or (*c*) on his bankruptcy. (8) by notice.

A lease determines : (*a*) on the expiry of the fixed time.

When the lease is for a fixed period, it does not determine till the end of that period. So if the lessee dies within the term of the lease, the leasehold estate will pass on to his heirs unless it be *expsessly* limited to the life of the lessee alone, in which case the lease terminates with the death of the lessee (3 M. I. A. 261). When the lease is for a fixed term there is no necessity for serving the tenant with a notice to quit, as the tenant knows beforehand when his lease is to determine. Again, when it is provided that the lease is to subsist till the happening of an event *which must*

(*b*) on the happening.

of the contingency.

happen in the future, the lease continues only till that event happens. When the interest of the lessor himself is determinable on the happening of an uncertain future event, the lease comes to an end as soon as that event occurs. For example, when the lease is given by a Hindu widow, the lease will determine on her death if it is not granted for any legal necessity.

(*c*) on the cessation of lessor's interests by the happening of an uncertain event.

(*d*) by Merger

Merger: The lease determines when the interests of the lessee and the lessor in the *whole* of the property become vested at the same time in *one person in the same right*; *i.e.* when the right of the lessee *merges* in that of the lessor. No man can be a landlord and tenant of the same property at the same time in the same right. Merger may take place either (*i*) by act of the parties, *e.g.*, when the lessor releases his interest in favour of the lessee, (*ii*) by operation of law, *e.g.* when the lessee takes the lessor's interest by succession. When a superior owner acquires a subordinate tenure, merger is the inevitable result; and if he intends to avoid merger, he must evince a clear intention to keep the inferior interest alive; (Cf. Merger under Sec. 101).

Q. A is the lessor and C the lessee of a particular immoveable property. After some time A acquires the interest of C as trustee of B. Will it create a merger? Give reasons for your answer—B. L. (Int.), 1927 (Jan.)—No merger, the acquisition of interest not being *in the same right*.

(*e*) by express surrender:

How is a lease determined by

The landlord and the tenant may by mutual agreement determine the lease before its time. This giving up of the tenancy is known as **surrender.**

When the surrender is accepted by the landlord no notice is necessary for the determination of the lease. A tenant cannot, however, validly surrender after giving notice unless the landlord agrees. When the lease has been assigned or sub-let to a third party the lease cannot affect such assignee or sub-lessee by his surrender. An express surrender may be made without a written instrument, but if an instrument be made at all it must be registered.

surrender? B. L. (Int.) 1929 (July).

Surrender need not always be express. The relation between the lessor and the lessee may be so altered as will imply a surrender (by conduct). Thus, where a lessee accepts from his lessor a new lease of the property (leased) to take effect during the continuance of the existing lease, the former lease thereupon determines because such an arrangement implies a surrender (B. L. Int.—1915, July). Similarly, when the lessee purchases the lease-hold property, or when the landlord resumes possession without any objection on the tenant's part there is a surrender by implication. But if the tenant does not pay rent for several years, the mere non-payment will not operate as a surrender.

(f) by implied surrender. 1917 (Aug.)

Forfeiture : The lessee will *forfeit* his lease when (1) he breaks an express condition which provides that on breach thereof the lessor may re-enter or (2) when he repudiates the lessor's right or sets up a title in himself or in a third person, *e.g.*, by executing a *kabuliyat* in his favour.* or (3) when he is adjudicated an insolvent, provided there is a right of re-entry by the lessor upon his bank-

(g) by forfeiture.

In what cases does a lessee forfeit his

* *Anondamoyi* v. *Lakhi Ch.*, 3 C. L. J., 274.

lease ? B. L. 1900.

Show how a lease of immoveable property is determined by forfeiture. B. L. 1913 (July.) 1917 (Jan.) 1917 (Aug.) 1918 (Aug.) 1919 (July.) 1929 (Jan.) 1929 (July.) 1930 (July.) Mad. 1908.

Under what conditions does a lease determine by forfeiture. B. L. (Int.) 1932 (Jan.)

ruptcy. There will however be no forfeiture in case of breach of the incumbent condition ***unless a power of re-entry is distinctly reserved by the lessor****. Therefore, where there is no proviso for the re-entry in the lease the lessor can sue only for damages or an injunction and not for an ejectment. We have seen under Sec. 10 (p. 38) that the lessor has the right to impose a condition on the lessee restraining him from alienating the property. On the lessee's attempt to break this condition, the lessor may restrain him by an injunction, or in the case of an actual breach thereof he may sue for damages. Under such circumstances a case of forfeiture does not arise unless there is a *distinct provison for re-entry* attached to the lease. After forfeiture has been incurred, it is further necessary that the lessor should give a notice in writing to the lessee of his intention to determine the lease. Thereafter, the landlord can maintain a suit for *khas* possession, provided he does not waive his right, 25 C. L. J. 332. A condition restraining *assignment* by the lessee does not cover the case of a mortgage of the leasehold property by the latter inasmuch as an *assignment* means only an absolute transfer.† But by virtue of sec. 12, it is quite possible for a lessor to impose a condition on his lessee that on the latter becoming insolvent, the lease shall determine. Such a condition will operate as a determination of the lease or have the effect of forfeiture only if a

* See *Udipi Seshagiri* v. *Seshamma*, 43 Mad., 503.

† *Bejaylal* v. *Benarasidas*, 54 Cal., 948.

right of re-entry upon the lessee's bankruptcy is distinctly reserved, and further if a written notice announcing the lessor's intention to terminate the lease is given.

The most important point about sec. 111, cl. (g) is that there will be no forfeiture of the tenancy on any of the grounds specified in it unless there is a right of re-entry and unless a written notice of intention to determine the lease is given to the lessee.

The mere institution of a suit for ejectment is not tantamount to giving notice as contemplated herein because the forfeiture must be completed and the lease determined before the commencement of the suit.† Service of notice is a condition precedent to the determination of the tenancy, and therefore, to institution of the ejectment suit.‡

Q. There is a stipulation in the lease that on alienation of the lessee's interest *the lease will be void.* The lessee transfers the lease and thereupon the lessor brings a suit for ejectment of the transferee. Is the lessor entitled to a decree for *khas* possession? B. L. (Int.) 1921 (Jan.).

Ans: The stipulation restraining alienation is valid (p. 38), but in absence of a right of re-entry such a condition cannot entail forfeiture at all; therefore, there will be no ejectment unless there is an express stipulation for re-entry. For the old law see (1).

† *Motilal* v. *Chandra Coomar*, 24 C. W. N. 1064.

‡ *Prokakh Ch.* v. *Rajendranath*, 58 Cal. 1359=35 C. W. N. 823.

(1) *Nowrang Singh* v. *Janardan*, 45 Cal., 469 (s. 27 C. L. J. 277); also 24 C. W. N., 1064.

*** *Forfeiture by denial of landlord's title*—arises as soon as the lessee disclaims his lessor's right by setting up a title in a third person or by claiming title in himself, and the lessor does some act showing his intention to determine the lease, 26 C. L. J. 262. In order to give rise to a forfeiture the disclaimer must be *clear* and must take place before a suit for ejectment has been brought, 45 Cal., 469. According to a Bombay decision (42 Bom. 195), institution of a suit for ejectment based on an allegation that the landlord's title has been repudiated, constitutes a sufficient manifestation of the landlord's intention to determine the lease, but the present law makes service of the previous notice a condition precedent to the maintainability of such a suit.

The law of Forfeiture entailed by repudiation of landlord's title under the T. P. Act and B. T. Act compared.

There is a material difference between the provisions of the T. P. Act and those of the B. T. Act with respect to the rule of forfeiture by reason of denial of the landlord's title. Under the latter Act such a denial will not entail a forfeiture until the denial has been given effect to by a decree. But under the T. P. Act a *mere* disclaimer with an assertion of the title in oneslf or in a third party is sufficient to give rise to a cause of action in favour of the landlord, (*Khater Mistri* v. *Shudduddi*, 34 Cal., 922), provided the requirements as to notice have been complied with. From what has been said it follows that under the T. P. Act a landlord can bring a suit for *khas* possession against a tenant who repudiated his title in a former suit upon serving the necessary notice; but

under the B. T. Act a suit for *khas* possession will not lie unless such denial was given effect to by means of a decree in the previous suit; *i.e.* to say, a suit for *khas* possession can be brought only if the previous rent suit had been dismissed because of such denial; (see 2 C. W. N., 755). Read the author's Bengal Tenancy Act, pp. 30-34.

Q. A brings a suit for rent against his tenant B. B unsuccessfully sets up the title of a third party as landlord. Can A evict B on this ground before the expiry of the term of the lease? If after the suit A accepts rent from B for a subsequent period, will it make any difference in the position? (Cal. 1927)—**Ans**: Yes, disclaimer of the landlord's title works forfeiture even before the expiry of the term of the lease. Acceptance of rent after the institution of the ejectment suit does not operate as a waiver.

The lease may be determined also by notice to quit or of intention to quit. As to what is *due notice*, see sec. 106 above (p. 360). If the lease is for a definite term, there can be no determination of tenancy by notice before the expiry of that term. When the lease is from year to year or from month to month (as contemplated in sec. 106) it is only then that it can be determined by notice hereunder. The tenant may surrender the lease by serving a notice of his intention to quit, on the lessor. But this is possible only when the lease is surrenderable. It has been *held* in *Maharaja Sir Jotindra Mohan Tagore* v. *Emam Ali*, 9 C. L. J., 632, that where the lease is entered into for a definite term and there is a clause in it expressly forbidding surrender by the tenant he cannot surrender before the expiry of the term. If in (h) by notice.

the notice to quit there is an alternative term demanding enhanced rent, the tenant by continuing in possession does not become a trespasser, but a tenant at the enhanced rate of rent, 62 I.C. 421.

Q. A, the lessor, gives B, the lessee, notice to quit on the 1st of January. The notice expires, and on the 20th January A gives another notice to B to quit on the 28th February. On the 15th January A sues for ejectment on the basis of the first notice. Can he succeed? Give reasons. [B. L. (Int.), 1925 (July)]—**Ans**: If the tenancy was according to the calendar month all the notices would be invalid. Evidently the tenancy contemplated herein has its own month. The suit on 15th January based on a notice of 1st January fails, as we don't get 15 days' time. Besides, there is waiver of the first notice, Cf. 43 C. L. J. 272.

What do you understand by the term, "Waiver of Forfeiture." B. L. 1902.

Sec. 112. Waiver of forfeiture: A forfeiture under sec. 111, Cl. (*g*) is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting;

What amounts to waiver of forfeiture. 1918 (Aug.)

(i) *Provided* that the lessor is aware that the forfeiture has been incurred.

(ii) *Provided* also that where the rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver. [All. 1926, Ext.].

How is a forfeiture waived or relieved against? B. L. 1909. 1913 (July). 1919 (July).

If the lessor *knowing full well* that a forfeiture has been incurred by the lessee for any of the reasons mentioned in sec. 111 (*g*), does any act which amounts to an acknowledgment of the tenancy, he waives such forfeiture. For instance,

if the lessor *knowingly* accepts the rent *due since the forfeiture* his acceptance will amount to waiver of forfeiture. Acceptance of rent in order to operate as a waiver of forfeiture, must be in respect of the rent which had accrued *since* the breach of the covenant entailing the forfeiture.* If the lessor accepts the rent in ignorance of the forfeiture there can be no waiver. The two *provisos* to the section are important as they clearly show when there will be waiver and when not. There can be no waiver unless "the lessor is aware that the forfeiture has been incurred." Nor is there any waiver when the landlord has accepted rent *after* the *institution of a suit to eject the lessee* on the ground of forfeiture. A forfeiture gives right to an action, and, if the action has once commenced, no subsequent conduct will defeat the suit on the ground of waiver except a compromise filed according to law and procedure, (14 Cal, 176; also 9 Cal., 143). But an acceptance of rent falling due after the forfeiture even if made *under protest* and *without prejudice to the right of forfeiture* will operate as a waiver if the action for ejectment has still to be brought.

Mad. 1908.

Explain the principle of waiver of forfeiture under Chap. V of the T. P. Act. B. L. 1910 (Jan.) All. 1926 (Ext.).

Hughes v. Metropolitan Ry. Co. B, a lessee was bound by the terms of the lease to repair the leased premises within 6 months of notice given by A, the lessor, and on default, A was to resume possession. Notice was given on 22nd Oct., 1874. But for some time negotiations were going on between A and B for a new arrangement with respect to the property. *Held,* the conduct of the lessor was such as

* *Raj Mohan v. Motilal,* 24 C L J, 546.

would justify an extension of the time of notice and forfeiture would be delayed.

Nowrang Singh v. Janardan, 45 Cal., 469, S. C. 22 C. W. N. 312 : 27 C. L. J., 277 ; A lease provided that should the lessee fail to pay the rent by the end of the year, the the lessor would be entitled to take *khas* possession of the leased property in the beginning of the first month of the next following year. The lessee allowed the rent for four years to fall in arrears ; thereupon the lessor instituted a suit to recover the arrears of rent together with a prayer for ejectment : *held* (1) that by claiming rent for the successive years the lessor had waived the forfeiture incurred by the tenant at the end of each year ; therefore there could be no decree for ejectment ; (ii) that there is no determination of a lease by forfeiture immediately on breach of covenant and the lessor must give a written notice of his intention to determine the lease. [The law stated in this case has been suitably modified to bring it in conformity with the present law].

Sec. 113. Waiver of notice to quit : A notice given under section 111, Cl. (*h*) is waived, with the express or implied consent of the person to whom it is given by an act on the part of the person giving it showing an intention to treat the the lease as subsisting.

Illustrations : (*a*) A, the lessor, gives B, the lessee, notice to quit the leased property. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived. [All. 1926, Ext.]

(*b*) If in the above example, B remains in possession even after the expiry of the first notice and A gives a *second* notice to quit, the first notice is waived.

This section deals with waiver of notice to quit, just as the preceding section deals with waiver of forfeiture.

There is a difference between a determination of tenancy by notice to quit and a forfeiture ; in the former case the tenancy is put an end to by the agreement of the parties—which determination of the tenancy cannot be waived without the *assent of both* ; but, in the case of a "forfeiture," the lease is voidable only at the election of the lessor ; in one case the estate continues, though voidable ; in the other, the tenancy is at an end. That is, in one case the determination may be a *unilateral* action ; in the other, it is a *bilateral* action. Thus, in illustration (*a*), one party pays rent and the other accepts it ; in illus (*b*) one party holds over and the other party gives a second notice which is an *acknowledgment* of a *subsisting* tenancy, see *Doe* v. *Palmer*, (1812) 16 East. 53. The section distinctly says that the notice-giver is to manifest his intention to treat the lease as subsisting and the person served must expressly or impliedly assent thereto. Waiver of a previous notice by a second notice presupposes the existence of the first notice. Therefore if the lessor denies having given the first notice, he cannot waive it Cf. 102 I. C. 821. Waiver of a previous notice is possible so long as its enforcement is open. After the determination of a tenancy by a notice to quit, the lessee becomes a trespasser and if his possession ripens into title by 12 years' occupation, there cannot any more be any waiver of the first notice by a second one. The section applies to notice given by both the lessor and the lessee.

Relief against forfeiture of non-payment of rent. Mad. 1904. All. 1925. (Ext.).

Sec. 114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders, to the lessor the rent in arrear, together with interest and costs, or furnishes security for payment within 15 days, the Court may in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture;

and thereupon the lessee shall hold the property as if the forfeiture had not occurred.

How far has a Court in Br. India urisdiction to relieve against forfeiture of a lease? All. 1925 (Int.).

This section embodies an equitable principle in order to do *substantial* justice between the parties when one of them seeks to enforce his contract against the other *literally* [See 58 Cal. 311]. The Court will always relieve against forfeiture resulting from non-payment of rent *unless the tenant has done something to forfeit his right to bring himself within the principle of equity.**

A lessor may, by the terms of his lease, impose various conditions on the lessee, on breach of any of which the whole lease may be liable to forfeiture —of course, when there is a proviso for re-entry in the lease. Thus, the lessee may agree that on his making a default in payment of rent the lease shall be forfeited. But forfeiture for non-payment of rent is subject to the provisions of sec. 114 which offer a relief to the defaulting tenant.

This section gives relief against forfeiture only in the case of non-payment of rent and not in the case of any other form of breach for which provision has been made in the next section. If the lessee pays or tenders the rent in arrears with interest and costs, or furnishes security for payment within 15 days, the Court will consider that to be sufficient amends for his delinquency and will not literally enforce the forfeiture provision.

* *Krishnaji* v. *Sitaram*, 45 Bom., 30.

Relief against forfeiture in certain other cases.

Sec. 114A. Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

(*a*) specifying the particular breach complained of; and

(*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

Relief against Forfeiture in certain cases: We have seen in sec. 111 (*g*) that a lessee incurs forfeiture of his tenancy in three cases: (*i*) where the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter, (*ii*) where the lessee denies the relationship of landlord and tenant by setting up a title in himself or in a third person, (*iii*) where the lessee becomes an adjudged insolvent and the lease provides for re-entry by the lessor in the event of the lessee's bankruptcy. We have also seen that the Act provides for relief against forfeiture for non-payment of rent in sec. 114. Such relief is not provided in cases of forfeiture from other cases. But it has been found that considerable hardship results where

forfeiture accrues on breach of an express condition which provides that on breach thereof the lessor may re-enter, although the breach is capable of an easy remedy. This defect does not exist in the English Law where there was provision made by the Conveyancing Act of 1881 for relief against forfeiture in such cases. These provisions of the Conveyancing Act have been reproduced in the English Law of Property Act, 1925, sec. 146. In this present new section the Legislature has made similar provisions, suitable to Indian conditions.

The new section provides that where there is a condition for forfeiture and re-entry in a lease. the lessor before instituting a suit for the breach complained of must serve a notice *in writing* on the lessee (*a*) specifying the breach and, (*b*) if the breach is capable of remedy, requiring the lessee to remedy the same. If notwithstanding such notice or demand,the lessee fails to remedy the breach *within a reasonable time*, an ejectment suit may be maintained, otherwise not. The notice thus virtually gives the lessee an opportunity to make amends for his contravention of the terms of a lease by setting things right, and is therefore an essential pre-requisite for the maintainability of an ejectment suit; without this essential warning and demand, such a suit will not lie. The lessee is to make amends for his wrong *within a reasonable* time of the receipt of the notice. What is or is not reasonable time has been left to the discretion of the Court. Comp. the provisions of this section with those of 155 of the Bengal Tenancy Act, which contains a somewhat similar provision under simillar circumstances. *Vide* in this connection the author's Bengal Tenancy Act, pp 825-832.

The proviso to the section is important. It says that this section does not apply where the breach complained of is in respect of an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased. This is so because these defaults are too serious to be overlooked. Besides, these wrongs can

scarcely be set right. The proviso also refers to the case of forfeiture for non-payment of rent, because that case has been specially provided for in sec. 114, *supra*.

[Q. Can the Court under any circumstances grant the tenant any relief when his lease has been determined by forfeiture? If so, state those circumstances.—B. L. (Int.), 1932, (Jan.)—See secs. 114 & 114 A.

Effect of surrender and forfeiture on under-leases. Mad. 00, 09, B. L. 1915.

Sec. 115. The **surrender,** express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but unless the surrender is made for the purpose of obtaining a new lease, the rent payable by and the contracts binding on, the under-lessee, shall be respectively payable to, and enforceable by the lessor.

State the difference in the effects of forfeiture and surrender on under-leases, [B. L. 1919. 1922 (July).] and explain the principle giving rise to such difference. [1929 (Jan.) and (July).]

The **forfeiture** of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor* in fraud of the under-lessees, or relief against the forfeiture is granted under sec. 114.

A man is not permitted to derogate from his own grant. So where an assignment of the lease-hold interest is not restricted by the lessor and the lessee in exercise of his power under s. 108 (j) sub-lets his lease to a third party, he cannot, any more, affect the under-lessee's interest by a surrender. As soon as the surrender is made a privity of estate

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* The word "lessor" is clearly a misprint for "lessee"—Dr. Gour's *Transfer of Property*, P. 1525.

is created between the lessor and the under-lessee and the latter at once becomes responsible to the lessor for his rent and the other terms on which he took his under-lease. If the law were otherwise *i.e.*, if the under-lessee were to forfeit his interest on surrender by the lessee, the result would be that the lessee would very often, in collusion with the lessor, surrender his lease and thereby cause immense injury to the under-lessees after having received considerable amount of money as *selami* or bonus from the latter.

What is the difference between surrender and forfeiture of a lease? Compare their legal effects on the under-leases and give reasons for your answer. B. L. (Int.) 1924 (July).

The law in the case of forfeiture is otherwise. Here the fault of the lessee is visited upon the head of the under-lessee whose interests are then annulled. If it were not so, the effect would be that the lessee would violate his stipulations with impunity and avoid forfeiture resulting from his conduct by under-letting beforehand his property to an under-lessee. But if the forfeiture has been procured by the lessee *in fraud of the under-lessee*, the latter's interest will be protected because the law is never merciful towards a defrauding party. In case of such a fraud the ostensible forfeiture is a surrender in reality.

Forfeiture, as we have seen does not imply any consent on the part of the lessee as surrender does. If annulment of the under-lease were permitted on surrender, the under-lessee would be entirely at the caprice of the lessee. But forfeiture being based upon a different footing much latitude is given to it. It should be remembered that a lessee cannot create an under-lease for a longer

time than his own lease ; so where the lessee himself holds for a limited number of years, the under-lessee's interest would come to an end on the expiry of those years, *Durga* v. *Gobardhan*, 20 C. L. J., 448.

Q. 1. A. grants a lease of immoveable property to B for a term of years subject to the condition that on the lessee selling his interest in the property the lease would become void and the lessor would be entitled to resume possession. B sub-lets the property to C. How would the rights of C under the sub-lease be affected if during the term of the sub-lease (*a*) B sells his interest in the property and A thereupon sues to resume possession, or (*b*) B voluntarily and with the consent of A gives up his interest in the property to A ? Give reasons. B. L. 1919 (Jan.)

Ans. Here the condition is to restrain the lessee's power of alienation—which is valid (sec. 10). It is also to be noticed that the lessor has reserved the right of re-entry. (*a*) On B's selling his interest he has incurred *forfeiture* ; so he can be ejected and the sub-lease can be annulled. (*b*) By voluntarily giving up the tenancy—to which wrongful act the lessor himself is a party—B cannot affect the sub-lease. (B. L. 1911, Jan.)

Q. 2. A gives a lease of immoveable property to B, with a condition that the lease would be void in case of transfer by the lessee of his interest. B transfers his interest to C, (*a*) Can A sue for ejectment of C ; (*b*) Whom can A sue for rent which accrued before and after the transfer ? (*c*) If instead of transferring his interest to C, B gives him an under-lease and then surrenders the lease to A, what would be the position of the under-lessee ?—B.L. (Int.), 1915 (Jan.).

Ans. (*a*) See Q. 1 (*b*) He can sue B before transfer, and after transfer he should sue C, although he can, at his option, sue B in the alternative see pp. 374-75 *ante*, and also 12 C. L. J. 256 : (*c*) See *Surrender*, S. 115.

Q. 3. B held certain land as lessee under M. The lease did not contain any covenant against sub-letting or any forfeiture clause. B sub-let a portion of the land to A. M then obtained a decree against B for arrears of rent, and in execution attached and sold the entire holding. Will the sale affect A's interest as sub-lessee ? (B. L. Int.)—1920, July.

Ans : No : See *Vishnu Atmaram* v. *Anant Vishnu*, 14 Bom., 384.

It may be asked why this section is limited to the under-lessee and not to the assignee from the lessee. The reason is obvious. The effect of an absolute assignment under sec. 108 (j) is that the lessee walks out and the lessor and the assignee come face to face and a privity of estate is established between them. They become landlord and tenant and the ex-tenant cannot any more affect that relationship. In the case of under-leases, the lessee does not walk out but intervenes between the lessor and the under-lessee, between whom there is no privity of estate ; the lessee is then like a link in the feudal chain and can by his act either benefit or prejudice the other two.

Effect of holding over. Explain—tenancy by holding over. Mad. 1915.

Sec. 116. Holding over : If a lessee or under-lessee of a property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106. That is to say, if the original lease were for agricultural or manufacturing purposes, it will be an annual tenancy and when for any other purposes, it will be a monthly tenancy.

Illustrations : (*a*) A lets a house to B for 5 years ; B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(*b*) A lets a firm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.—B. L. (Int.), 1921 (Jan.).

(*c*) A lets out lands for manufacturing purposes to B for 10 years. After the expiry of the term, B is allowed to remain in possession with the consent of A for two years more. If A then wants to eject B, to what notice would the latter be entitled? [B. L. (Int), 1922, July]—*Ans* : the lease being for a manufacturing purpose, the holding over gives rise to an annual tenancy terminable with 6 months' notice. But in this case no notice will be necessary as the holding is for *two* years only with consent ; therefore, the lease will come to an end by efflux of time.

(*d*) If in illus. (*c*) B is allowed to hold over indefinitely and not for a definite period of two years, 6 months' notice will be necessary.

Distinction between a tenant holding over and tenant-at-sufferance.

When determination of the lease takes place the lessee is bound to surrender possession of the property and on default he may be ejected without notice, 24 C. L. J. 30. But if he remains in possession of the property, and if the lessor consents to the continuance of the lease by accepting rents or otherwise assents to it, there will be *a new tenancy* by the tenant's so *holding* over. But so long as the lessor does not assent to the continuance of the lease, there is no holding over and by continued possession the tenant becomes what is known as *tenant-at-sufferance, i.e.*, a tenant who comes in by right and holds over *without the consent*

of the landlord and therefore without right.* It should be noticed that there is some distinction between a *tenant holding over* and a *tenant-at-sufferance*. A tenant holding over remains in possession with the assent of the lessor and has therefore some right to the property; while a tenant-at-sufferance merely enjoys possession of the property without having any interest in the property. Though he is not strictly a trespasser in the sense in which criminal law understands it, still, there is no privity of estate between him and the landlord. He cannot transfer any interest in the property to anybody nor can he transmit any right to his successors. So when a tenant-at-sufferance dies, his heirs in possession of the property may be treated as trespassers. Besides, while the tenant holding over cannot be ejected without any notice to quit under sec. 106, the tenant-at-sufferance is not entitled to any such notice at all.

What is tenant-at-sufferance? B. L. 1910 (July). All. 1922. All. 1925. (Ext.).

The effect of holding over is to create a new tenancy, practically on the same terms as the old one, only with this variation that the lease is simply renewed from year to year or from month to month, according to its purpose. In other respects, viz, rate of rent, enjoyment of the products etc., the old condition may prevail.

Q. What is the nature of the possession of a tenant for a fixed term who holds over after the expiry of the term without paying rent and where the lessor does not otherwise

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* See *Bengal National Bank* v. *Janaki Nath Roy*, 54 Cal., 813 =31 C. W. N. 973.

assent to his continuing in possession (All. 1923)—*Ans:* He is a tenant-at-sufferance.

The section applies in the absence of an agreement to the contrary. Therefore where after the termination of the original tenancy, there is payment and acceptance of rent *without prejudice to the rights of the parties* there will be no holding over.*

N. B.—Sec. 116 does not apply to a case in which the lease is continued owing to waiver of forfeiture.

Exemption of leases for agricultural purposes.

Sec. 117. None of the provisions of Chapter V (secs. 105—117) apply to leases for *agricultural purposes.* As to what is an agricultural purpose, see 48 All., 385.

But the Local Government may by notification in the local Gazette, make all or any of these provisions applicable to agricultural leases. The exemption of agricultural leases from the operation of this chapter has been made with the object of leaving undisturbed the existing laws relating to agricultural tenancies.

The Government notification in order to be operative must be published for six months.

In Bengal all relations between landlords and tenants with respect to the agricultural lands and homesteads attached thereto are governed by the B. T. Act (VIII of 1885). But purely homestead lands come within the operation of T. P. Act. Thus, it has been held that the holding over

* *Kamakhya Narain* v. *Ram Rakha*, 7 Pat. 649=32 C. W. N. 897=48 C. L. J 67 P.C.

of a homestead land is governed by this Act, See *Safar Ali* v. *Abdul Majid*, 31 C. W. N. 282. *Service tenures* fall within the latter Act and not the former. (See 3 C. L. J., 274 and 2 C. L. J. 403).

As to the incidents of a service tenure, see *Ramnath* v. *Shib Sundari*, 25 C. L. J., 332.

CHAPTER VI.

Of Exchanges.

N.B : The Chapter heading does not refer to the nature of the property, i.e. whether it is moveable or immoveable as the head lines in the Chapters on Sale, Mortgage and Lease do. Therefore, the rules of this Chapter apply to an exchange of moveables as well. The Chapter on Gift is likewise not confined to immoveable property only. This is why the terms "Exchange" and "Gift" are defined in general terms in the Act.

Exchange defined. B. L. Int.) 1913 (July). 1929 (July). All. 1898.

Sec. 118. Exchange : When two persons *mutually transfer* the owner-ship of one thing for the owner-ship of another, *neither thing or both things being money only*, the transaction is called an "exchange."

How can immoveable property be transferred by way of exchange under the T. P. Act? B. L. 1911 (Jan.) 1913 (July).

A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale, *i.e.*, a registered instrument is necessary in the case of an exchange of land of the value of Rs. 100 and upwards, as well as in the case of a reversion or other intangible thing. In the case of lands

below Rs. 100, exchange may be effected by delivery alone.* Where a contract for exchange is in writing and has been partly performed and either or both of the parties have got possession, the defect of want of registration will be cured by sec. 53A. Remember however that the doctrine of Part Performance does not apply unless the contract is *in writing*. It must be carefully noted that exchange is possible only when *neither* thing is money, or when *both* the things are money. There can be no exchange of a *thing* for money, as then it will become a sale. As to an exchange of money, see sec. 121 below. A transfer of property in consideration of forbearance to sue is no exchange as there is no mutual transfer of ownership.†

Distinguish a sale from an exchange. B. L. (Int.) 1929 (July). All. 1922.

***Q.* A Mukhtear purchased a Court-fee stamp for a cilent. He then transferred it to another client, the latter having agreed to return to the Mukhtear another Court-fee stamp of the same value. Is the transaction a sale or an exchange ?—Cal. 1929 (July)—*Ans.* An exchange; see *Kedarnath* v, *Emperor*, 30 Cal. 921 = 7 C. W. N. 704.**

An Exchange is quite a different thing from a Partition. So this section cannot apply to a partition wherein the several co-owners take specific parts of the common property in lieu of their respective undivided shares in the whole, *Gyanessa* v. *Mobarakanessa*, 2 C. W. N., 91.

In what respect does a "partition" differ from an "exchange"? B. L. 1910 (Jan.)

*** *The distinction between* **Exchange** *and* **Partition** :—An exchange differs from a partition in the fact that while the former consists in

* Cf. 38 Mad., 519 ; 40 Mad., 1134.
† *Venkata* v. *Venkata*, 54 Mad. 163.

the mutual *transfer* of respective ownership of two persons in *two different specific* properties, the latter is a mere *arrangement* by virtue of which the several co-owning proprietors hold in severalty the lands which they had before held in common. In an exchange the exchanged properties are respectively the *exclusive* properties of the parties to the exchange. One person cannot say that he had previous to the exchange any interest in the property he has got by the exchange. But in the case of a partition each person has as much interest in the entire property as the other. There is no question of *exclusive* ownership in a case of partition. Partition is merely the taking of a specific part of the property in lieu of an undivided share in the entire property: it is the surrender of a portion of a joint property for a similar surrender from the co-sharer, 43 Cal., 504 (22 C. L. J., 259). The right of partition is an incident of property, while exchange is based on a contract between the parties. See also 2 C. W. N. 91 :—"When some of the co-owners possessing an undivided share in several properties take, by arrangement, a *specific* property in lieu of their shares in all, the transaction effected is a partition and not an exchange within the meaning of sec. 118 of the T. P. Act."

What are the rights of a party deprived of the thing received in exchange by reason of a defect in the

Sec. 119. Right of Party deprived of thing received in Exchange : If any party to an exchange or any person claiming through or under such party is *by reason of any defect* in the title of the other party deprived of the thing or any part of the thing received by him in ex-

change, then, *unless a contray intention appears from the terms of the exchange,* such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option, of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

title of the other party B. L. (Int.) 1913 (July). 1917 (Aug.)

This section implies a warranty of title by each party and gives two remedies to the suffering party; (1) he may claim compensation for the loss or, (2) may have the contract rescinded and recover back his own property exchanged for. Physical return of the property is practicable only in the case when the property is still in the possession of the other party or his legal representative or his gratuitous transferee. The suffering party has no remedy as against a transferee for value from the other party. The right of the suffering party contemplated by this section is available to a person claiming through or under him, that is, his transferees. The benefit of the section can be availed of only *if a contrary intention does not appear from the terms of the exchange.*

Sec 120. Rights and Liabilities of parties to an exchange. The rights and liablities of the parties to an exchange are, save as provided by the 6th Chapter, similar to those to which the seller and buyer are subject under section 55 above.

This section makes the rules relating to the rights and liabilities of buyer and seller applicable

to the parties to an exchange, of course, in so far as such rules do not stand modified by the provision of this Chapter, particularly of sec. 119. It should be remembered that each party to an exchange is virtually both a buyer and a seller.

Valkart *v.* **Vattivelee** ; 11 Mad., 459 : Cotton was exchanged for another thing and was given delivery of : after delivery the cotton was destroyed by fire ; *held* the loss would fall on the transferee. This decision affirms the maxim "Risk follows ownership."

In England, the rule of *caveat emptor* being applicable, if after exchange one article be found worthless the transaction does not fall to the ground. In *La Neuville* v *Nourse*, 3 Camp., 351, for instance, wine was exchanged for burgundy which turned out worthless—the exchange was not cancelled. In India the bargain would be cancellable.

Exchange of money.

Sec. 121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

So when money is paid for *forged* bills or forged currency notes, the money may be recovered.

Q. A gives Rs. 100 in silver coins to B in exchange for a hundred-rupee currency note given by B to A. What remedy has A against B if the currency note is found to be forged, (All. 1927, *Int.*)—*Ans.* The exchange fails for want of consideration and A can recover his money.

N. B.—Government currency notes are not "goods," 3 Cal., 379, but money ; therefore if money be given for such notes it will be a case of exchange, because *both* the things are money.

CHAPTER VII.

Of Gifts.

N. B: The heading indicates that the chapter covers gifts of both moveables and immoveables. *Vide* head notes under Ch. VI.

Sec. 122. "**Gift**" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by the donor, to the donee, and accepted by or on behalf of the donee.

Gift defined.

How is a gift defined in the T. P. Act? B. L. (Int.) 1912 (Jan.) 1915 (Jan.) 1915 (July). 1920 (Jan.) 1930 (July) 1931 (July).

Such acceptance may be made during the life-time of the donor, and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

What are the essentials of a valid gift under T. P. Act and what formalities are to be adopted for making a gift? B. L. (Int.) 1915 (Jan.) 1917 (Jan.) 1918 (Aug.) 1919 (Jan.) 1927 (July).

The Requisites of a valid gift : (1) There should be a *donor* and a *donee* ; (2) The subject of gift must be *certain* and *existing* and capable of transfer : (3) The gift should be made *voluntarily* and without *consideration* : (4) There should be a *transfer* on the part of the donor : (5) There should be an *acceptance* by or on behalf of the donee during his life-time : (6) The acceptance must be at a time when the donor is *alive* and is *capable of giving* ; (7) and (8) therefore it necessarily follows that the donor and the donee must both be living. See p. 413 (9) When the property is *immoveable* there must be a registered instrument properly attested ; (10) In case of moveable property there must be either a registered instrument properly attested or delivery of possession. The section lays a stress on the *acceptance* of the gift. For reasons see p. 412, *post.* Acceptance implies existence of the property ; therefore the definition

Can there be a gift of future property? B. L. (Int.) 1930 (July).

uses the words "certain existing" and consequently there can be no gift of *future* property. Emphasis is also laid on the *voluntary* character of the transaction (1) to make it sure that it is made not under undue influence or duress &c. and (2) to repel an argument that a gift, by reason of absence of consideration, is not a contract like the other forms of transfer and is therefore not liable to be defeated by being involuntary.

Gift how effected, *i.e.* what formalities have to be observed for making a gift. 1918 (Jan.) 1919 (July). 1921 (Jan.) 1931 (July.)

Sec. 123. *Gift how effected*: For the purposes of making a gift of *immoveable* property the transfer *must* be effected by a registered instrument signed by or on behalf of the donor, and *attested* by at least *two witnesses*.

For the purpose of making a gift of *moveable* property, the transfer may be effected either by a registered instrument signed as aforesaid, or by *delivery*.

Such delivery may be made in the same way as goods sold may be delivered.

In the case of immoveable property is delivery essential? 1918 (Aug.) 1921 (Jan.)

Where the gift is in respect of *immoveable* property, whether below Rs. 100 or not, there must always be a registered instrument properly signed; and attested by *two* or more witnesses; and in the case of *moveable* property there are *two* alternative modes for effecting a gift—(1) a registered instrument; (2) delivery of possession.

Ex. 1. A makes a gift of land valued at Rs. 50 by an unregistered deed and *delivers possession* of it to the donee. Has the donee acquired any right to the property? B. L. (Int.), 1919 (July);—*Ans.* No. (Cf. 45 Bom., 164).

Ex. 2. A, a Hindu makes an oral gift of immoveable property to his son B, and delivers possession to him. B, being subsequently dispossessed by a trespasser C, institutes a suit for possession. The law is that a person cannot

recover possession unless he can prove title ; can B succeed in the suit ? Would it make any difference if the donor had been a Mahomedan ? [B. L. (Int.), 1932 (Jan.)] *Ans* : (1) No ; (2) Under the Maho. Law, the donee's title is perfected by mere delivery of possession.

N. B. The condition as to attestation is provided to guard against fabrication to which this description of transfer is very much prone.

Is Registration compulsory for a deed of gift of a house valid at Rs. 50, executed by a Mahomedan ? B. L. 1911 (July).

The provisions of the chapter on Gifts do not affect any rule of Mahomedan law. Under the old Hindu law there could not be any valid gift without delivery of possession ; but this old rule has been abrogated by the T. P. Act. *Under the T. P. Act, delivery is not indispensable for a valid gift of immoveable property which may be effected by a registered instrument, signed by or on behalf of the donor and attested by two witnesses. As Mahomedan Law is completely exempted by sec. 129 from the operation of the 7th chapter of the T. P. Act, a valid gift under that law may be effected by delivery of possession, without any instrument either written, or written and registered.

Difference in the mode of transfer of immoveable property by sale or gift. 1929 (Jan.)

Sale v. Gift : In the case of a gift, attestation is compulsory, but not so in the case of sale. Registration is compulsory for a gift irrespective of the value of the property ; but a sale of property below Rs. 100 may be effected by delivery of possession. Acceptance is a necessary condition for a gift ; in the case of sale, such acceptance is only implied in the payment of consideration.

When Gift becomes complete : As registration is compulsory for a gift, one would naturally expect that a gift is not complete till registration (as is the case with sale, mortgage etc.), but it should be remembered that when the instrument of gift has been handed over by the donor to the donee and accepted by him, the donor has done everything in his power to complete the transaction and as registration of the instrument does not depend on his consent

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*See *Lallu Singh* v. *Gur Naryan*, 45 All, 115, F. B.

and may be effected notwithstanding his refusal (*Kalyan Sundaram* v. *Karuppa*, A. I. R. 1927 P. C. 42), it necessarily follows that the gift is completed by mere execution and acceptance of the instrument and ownership passes to the donee instantaneously and registration may be effected later on and therefore it is no longer open to the donor to revoke the gift. This difference between a gift and the other forms of transfer (which are completed by registration) in this respect may be accounted for by the fact that unless this leniency were shown to him the donee would be helpless as he cannot specifically enforce a *promise* to give in the manner in which a *contract* for sale can be specifically enforced inasmuch as such a gratuitous promise is no contract and therefore admits of no specific performance.

Gift of existing and future property.

Sec. 124. A gift comprising both existing and future property is void as to the latter.

N. B. This follows as a necessary corollary from the definition of gift which involves the existence of the property.

Gift to several donees, of whom one does not accept.

Sec. 125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken, had he accepted.

N. B. The accepting donee only takes his share and not the whole property by survivorship as under the English Law.

Give the chief provisions of the T. P. Act relating to gifts. B. L. 1905.

The chief provisions of the T. P. Act relating to Gifts :

(1) The gift should be made voluntarily and without consideration by the donor.

(2) It should be accepted by or on behalf of the donee.

(3) Acceptance must be made during the life-time of the donor and while he is still capable of giving.

(4) The gift in case of *immoveable* property can be made only by a registered instrument *signed by or on behalf of the donor* and attested by at least two witnesses.

Does a gift of immoveable property of the value of Rs. 99 require Registration? —Yes: B. L. 1910 (Jan.)

(5) The gift in case of moveable property may be effected either, (i) by a registered instrument signed as aforesaid, or (ii) by delivery.

(6) A gift comprising both *existing* and *future* property is void as to the latter (sec. 124), as a valid gift involves the idea of the existence of the property.

(7) A gift to two or more donees, of whom one does not accept it is void as to the interest which he would have taken had he accepted, (sec. 125).

(8) A gift cannot be revoked at the mere will of the donor. But it may be suspended or revoked on the happening of the contingency on which it is made to depend by mutual agreement. A gift is also revocable for any of the causes (save want of failure of consideration) for which a contract is rescindable, *e.g.*, coercion, fraud, undue influence, misrepresentation etc. (Sec. 126).

N. B.—A gift cannot be revoked for want of or failure of consideration or on the ground of ingratitude.

(9) When the gift is a *single transfer* and is partly onerous, the donee can take nothing by the gift unless he accepts it fully; but when the gift is in the form of *two or more separate and independent* transfers, the donee may accept the beneficial transfers, and refuse the onerous ones, (sec. 127).

(10) When the gift consists of the donor's entire property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

(11) The above provisions do not affect donations *mortis causa* or any rule of Mahomedan Law (section 129).

Acceptance is an essential condition for a valid gift. How can it be made?

Acceptance: We have seen that *acceptance* is an *essential* condition for making a valid gift. There must always be an acceptance; if the donee cannot himself accept, acceptance on his behalf by some one else will do. Thus, where the donee is a minor or is otherwise disqualified, or when he is in embryo, acceptance by a guardian, or a duly qualified person, or (as in the last case) by the person, under whose authority he will be placed on his birth, will be sufficient. We have seen at p. 34, *ante*, that according to some cases it is open to a minor to accept a gift, if not onerous, Cf. 13 N. L. R. 18. Where the donee is a corporation or an idol, acceptance by a proper authority will perfect the gift.

Can a valid gift be made to a Minor? 1915 (Jan.)

Acceptance is an essential ingredient in a gift, although it is not so in the other forms of transfer (sale, mortgage etc.) The reason for this is that in those forms of transfer, consideration has to be paid and payment of consideration virtually implies an acceptance. No consideration has to be paid in the case of a gift. so acceptance is made

essential in a gift, so that the transaction may not be a pure unilateral or one-sided affair.

Acceptance must be made during the life-time of the donor, and while he is still capable of giving. Again, if the donee dies before acceptance, the gift is void, as by the donee's death acceptance is rendered impossible and without acceptance a gift is not complete. So we see that both the donor and the donee must be alive at the time of acceptance.

Now, what is *acceptance*? The Act is silent as to how acceptance should be made. Actually receiving the property is acceptance while possession is evidence of acceptance having been made; but there may be acceptance without delivery on the donor's part. When the instrument of gift has been handed over to the donee and been received by him, there is acceptance. When the donee has consented to the gift, his conduct will amount to an acceptance. Positive consent is not always necessary; even mere absence of *dissent* (regard being had to the surrounding circumstances) may complete a gift. *Acceptance* should be as an acceptance of gift. Thus, where the donor made a gift but the donee accepted it as a loan, there was no gift.

Registration indispensable irrespective of the value of the property.

Registration: Registration is compulsory in the case of a gift of *immoveable* property whether the value of the property be below Rs. 100 or not. But it is not necessary that the deed should be registered by the donor himself. Nor does

When does a gift become complete? B. L. (Int.) 1931 (July.)

registration depend upon his consent.* It is enough if there are offer and acceptance during the life-time of the parties. Once the deed is executed, the law will allow it to be registered even though the donor may not agree in its registration and upon registration the gift takes effect from the date of execution. Where a Hindu executed a deed of gift in favour of his wife and died, and the deed was subsequently registered, it was *held* to be valid.† Similarly, a deed of gift registered by the donee after the donor's death without the consent of the legal representatives of the donor is valid.‡ In the case of a gift of *moveable* property registration is not cumpulsory provided the gift is accompanied by delivery of possession; but where there is no delivery the deed must be registered ; See 6 All., 634 below. Besides, the instrument should be signed by the donor himself or signed on his behalf by some duly authorised person, and attested by at least *two* witnesses.

How delivery is made: The mode of delivery is different with different things. When the property is in the possession of the donee, simple acquiescence on his part takes the place of delivery. When the property is in the hands of a third person, a request to such person to make over the property is delivery. Delivery

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* *Kalyan Sundaram* v. *Karuppa*, A. I. R. 1927 P. C. 42.

† *Nanda Kishore* v. *Surja*, 20 All., 392.

‡ *Venkati Rama* v. *Pillati Rama*, 40 Mad., 204 F. B.

of Government Promissory notes is made by endorsement.

Janki Das v. E. I. Ry. Co.: 6 All., 634: K, a servant of the E. I. Ry., Co., was recommended by the Manager a bonus in consideration of good services. The recommendation was sanctioned and the bonus was sent to the pay-master for payment to K, but was not paid to him. J, a decree-holder of K, sought to attach the bonus in the hands of the pay-master. *Held*, the bonus was a gift of moveable property without a registered instrument; so, as delivery was not given to K, the gift failed and therefore J. could not attach it. Cf. *Gibson* v. *E. I. Co*, 8 Bing. (N. C.) 262.

Gift to joint donees: When a gift is made to *two or more persons jointly*, it does not fail in its entirety if one of the donees does not accept. The gift is void only as to the interest of the non-accepting donee. In other words, his share does not go to increase the shares of the rest of the donees because the latter cannot be expected to accept *what was never given to them.* "In principle there is no difference between a gift to a class and a gift to joint-donees. (Shephard and Brown).

Explain the rule which governs a case where one of two or more donees does not accept the gift. Mad. 1902.

Q. A makes a gift of Rs. 1,000 to B and C. B dies before acceptance; what would be the effect of the gift as regards C? (B. L. Int., 1915. Jan.; 1920, Jan.)—The gift takes effect to the extent of C's share.

Revocation of Gift: The general principle is that a gift is not revocable, but **Sec. 126** provides for two cases where a gift may be suspended or revoked.

When may a gift be suspended or revoked? Give reasons and illustrations. B. L. (Int.) 1915 (July).

(1) When the donor and donee have agreed that on the happening of a *specified* event (not

1918 (Jan.) 1918 (Aug.) 1919 (July). 1920 (Jan.) 1921 (July). 1922 (July). 1931 (July). Mad. (1915). All. 1924 All. 1926 (Int.)

depending upon the will of the donor,) the gift should be suspended or revoked;

Illus. A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's life-time; A may take back the field.

(2) A gift may also be revoked in any of the cases (save *want or failure of consideration*) in which if it were a contract, it might be rescinded (*e.g.*, when the gift is made under co-ercion, undue influence, fraud, misrepresentation etc.)

A gift in any of such cases is revocable, as such a gift is not *voluntary* (see sec. 122). A gift should never be revoked on the ground of failure of consideration. It is a voluntary act, and is marked out by absence of *consideration.* Consequently, if a gift were to fail for want of consideration, there could be no valid gift at all. So, a gift can be cancelled on all the grounds on which a contract can be avoided (*e g.* fraud, co-ercion etc.) *save and except failure of consideration, Behari* v. *Sindhubala*, 45 Cal., 434=27 C. L. J. 427. In a Bombay case * a question was raised as to whether a gift completed by delivery of the instrument of gift, duly executed and attested but not registered could be revoked, and the Court held that the mere fact that registration was still to be effected did not confer any power on the donor to revoke the gift. This view has subsequently been approved by the Privy Council (†).

When a gift is challenged on the ground of co-ercion fraud etc. the onus is on the party impeaching it. But in the case of a gift by an invalid person or a pardanashin

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* *Atmaram Sakharam* v. *Vaman Janardhan*, 49 Bom., 388 (F. B.). See also *Venkata Subba* v. *Subba Rama*, 52 Bom. 313= 32 C. W. N. 708 (P. C.)

† *Kalyansunderam* v. *Karuppan Moopanar*, 50 Mad. 103=31 C .W. N. 509=45 C. L. J. 435 (P. C.)

lady the onus is on the party who supports it to show that it was voluntary and with full knowledge of its contents. A gift cannot be revoked on any other grounds (such as imprudence, lack of foresight) than those specified in the section. A Mahomedan's power of revocation of a gift is not affected by this section.

[Q. Can the donor revoke a gift merely on the ground that he had not had an absolute indefeasible title to the property. Discuss. (Cal. 1929, July). *Ans.* A gift is revocable only on the grounds mentioned in section 126. Therefore, a donor cannot revoke a gift merely on the ground that he had not had an absolute indefeasible title to the pro-property, *Govind* v. *Mohan*, 24 All., 157. Cf. 27 All. 169.]

Void gifts: A gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

Illustration.—A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000 but is void as to Rs. 10,000, which continues to belong to A. [B. L. Int, 1915, July); All. 1922; All. 1926, *Int.*]

A gift which is made for an unlawful purpose is void [Sec. 6 (h)]. A gift depending on a condition, the fulfilment of which is impossible or forbidden by law, cannot take effect. But when an unlawful condition-subsequent is attached to the gift, the gift takes effect notwithstanding the void condition; (see p. 82). A gift is not however liable to be set aside merely on the ground of *mistake* if it is not vitiated by fraud or undue influence. A donor made a gift to a man desiring him to perform his *Sradh*; the donee turned out

to be a man of *vinna gotra*, and as such unable to perform the *Sradh*. The gift was upheld notwithstanding the donor's mistake as to the donee's *gotra*, since it was not procured by fraud or undue influence. But when the relation between the donor and the donee is such that the latter is likely to domineer over the will of the former or that the former is not likely to have any independent advice the gift will be set aside.

Proviso to Sec. 126. Nothing in sec. 126 shall be deemed to affect the rights of transferees for consideration without notice. When the gift is revoked owing to the causes mentioned in section 126, the donee ceases to have any interest in the property. But if before revocation the donee has transferred the property to a third party who takes it for consideration and without notice, the donor cannot exercise his power of revocation given him by sec. 126 to the prejudice of such third person.

Q. 1. A knowing that her husband is alive induces B to marry her in the belief that she is a widow, and B after his supposed marriage with A, gives her a house and promises in writing to pay her Rs. 5,000 within 2 years. A year later A sells the house and her claim to the sum of Rs. 5000 to X who buys them in ignorance of the deception practised upon B. How far is this transaction valid against B? Give your reasons. (All. 1924). *Ans.*: Although the gift of the house is induced by fraud, X (*bona fide* transferee for consideration without notice) is protected under *proviso* to sec. 126, and B has no remedy against him. As regards the sum of Rs. 5000, the mere promise to give does not perfect A's title, it is not even an actionable claim [see *Forest* v. *Forest*, (1865) L. T. 763)] and therefore it could not be transferred to X.

Q. 2 : One T owned seven villages. She executed a registered deed of gift with respect to all the villages in favour of her daughter, N, giving immediate and absolute possession of 4 villages. As to the remaining three, the condition was that T would retain their possession and enjoy their profit till her death, after which N would take possession of the same. Is the gift in respect of three villages valid ? (All. 1925, Int.) *Ans.* : None of the sections of this chapter are herein contravened ; therefore the reservation of three properties till the donor's death is quite valid, *vide* notes at p. 40.

Sec. 127. Onerous Gifts : A gift may not always be of a purely beneficial character, but may at times be burdened with an obligation, *e.g.*, when shares in a company subject to heavy calls form the subject-matter of a gift. It is then called an onerous gift. When the gift is a *single transfer* and is partly onerous, the donee can take nothing by the gift unless he elects to accept it fully ; because a single transaction cannot be divided in the eye of law, and hence the transaction is to be accepted as a whole or rejected altogether. The donee cannot appropriate benefits and throw out the burdens.

What is an Onerous Gift ? Mad. 08, 13.

Illustration :—A has shares in X, a prosperous joint-stock company and also shares in Y, a joint-stock company in difficulties. Heavy calls are expected in respect of the shares in Y ; A gives B all his shares in the joint-stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

When the gift is in the form of *two or more separate* and *independent* transfers of several things, to the same person, the donee is at liberty to accept one of them and refuse the others, al-

though the former may be beneficial and the latter onerous.

Illustration :—A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money ; B refuses to accept the lease. He does not by this refusal forfeit the money.

Onerous gift to disqualified persons.

We know that a disqualified person (e.g., a minor) may be a donee but he cannot create obligations against himself. So when an onerous gift is made to him and he accepts it,* he is not bound by the obligation with which the gift is burdened. The result is that when the disqualification is removed, he may avoid the obligation by returning the property to the donor within a reasonable time. But if even then he retains it, being fully aware of the obligation, the gift becomes irrevocable.

What are the liabilities of a Universal Donee ? B. L. (Int.) 1913 (Jan.) Mad. 1913.

Sec. 128. Universal donee : is one to whom the donor's whole property is given and who *consequently* becomes liable for all the debts due by, and liabilities of, the donor at the time of the gift to the extent of the property comprised in the gift. [*N.B.*—When the donor gives his whole property to a donee such donee becomes, by virtue of the gift, liable to the extent of the property in his hands not only for the debts of the donor, but also for his other liabilities.]

There is some difference between a universal successor and a universal donee ; a universal succession take place when the rights and duties of a man, his *universitas juris*,

devolve upon another by operation of law on his death or bankruptcy ; while a universal donation is a voluntary act *inter vivos* and the donee if he accepts the gift becomes liable under sec. 128 for the debts of the donor but *only to the extent of the assets received*. The law does not oblige him to discharge the donor's debts out of his own pocket. Nor is he bound to pay such of the debts as did not exist at the time of the gift but were incurred subsequently.

Saving as to donations *mortis causa* and Maho. Law.

Sec. 129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Mohammadan law.

Donations *mortis causa* saved from the operation of Chapter vi of T. P. Act. All. 1921.

By the term *donatio mortis causa*, is meant a gift made in anticipation, and in the event of death. The gift is made upon the condition that if the fatal accident befalls the donor the donee shall become the owner of the property given, but if the donor survives or alters his mind, he shall receive back the same. That is the property reverts to the donor on his recovery. Such a donation is also revocable at the will of the donor. Such a gift has been exempted from the operation of Chapter VII. in as much as its incidents as to reversion, revocability etc. are inconsistent with the rules thereof. Now-a-days, the donations *mortis causa* are placed, almost, on the footing of legacies.

What special cases of gift are exempted from the provisions of the Act? B. L. (Int.) 1916 (Jan.)

Recapitulation : We have already seen that by section 129 donations *mortis causa* in respect of *moveable* property have been exempted from the operation of the 7th Chapter of the T. P. Act, *i.e.*, the chapter on Gifts. That section also lays down

that nothing in that Chapter shall be deemed to affect any rule of Mahomedan law. As Mahomedan Law in not affected by this Chapter.* a Mahomedan may make a valid gift without a registered instrument provided he gives delivery of possesion inasmuch as delivery is an essential condition of a valid gift under the Mahomedan Law,† and conversely mere execution and registration of a deed will not validate a Mahomedan gift unaccompanied by delivery of possession.‡ The provisions of this chapter are based on general principles and do not conflict with the rules of Hindu, or Bhuddist law ; therefore the reservation regarding these sects, formerly contained in the section, has now been deleted.

CHAPTER VIII.

Transfers of Actionable Claims.

Transfer of actionable claim. State the formalities prescribed by T. P. Act for transfer of an actionable claim. B. L. (Int.) 1917 (Jan.) Mad. 1912.

Sec. 130. *How effected* : The transfer of an actionable claim whether with or without consideration, is effected only by the execution of an instrument in writing signed by the transferor or his duly-authorised agent, and is complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, vest in the transferee whether any notice of such transfer be given or not in the manner prescribed

* *Nasib Ali* v. *Wajed Ali*, 44 C. L. J., 400.
† See my *Anglo-Mahomedan Law*, 4th Ed., Ch. XV., p. 237.
‡ *Sadik Husain* v. *Hashim Ali*, 38 All. 627=25 C. L. J. 363 P. C.

by sec. 131. The section does not require registration.

N. B. Section 130 (1) of the T. P. Act covers transfers of actionable claims by way of security as well as absolute transfers thereof.* By reason of this section gifts of life policies should be effected by means of a writing. A gift of an actionable claim by a Mahomedan is not exempt from the operation of this section. By virtue of the *exception, infra,* transfers of marine and fire policies are not within this section.

The effect of a transfer of an actionable claim :

The transferee of an actionable claim may, upon the execution of such instrument of transfer, *sue* or *institute proceedings* for the same *in his own name* without obtaining the transferor's consent to such suit or proceedings and *without making him a party thereto.* The transferee's right of action exists even when no notice has been given to the debtor. After the transfer, the transferor's right of action is lost; so if he sues the debtor for his own benefit he may be restrained by an injunction, (*Jeffs* v. *Day*, L. R. 1 Q. B., 372). Again, if the transferor seeks to defeat his own assignment by realising or releasing the debt he will be liable to an action, (*Aulton* v. *Atkins*, 18 C. B. 249).

A chose in action is assignable, and the assignee can sue in his own name without joining the assignor.

Proviso : A transfer of an actionable claim is complete when the instrument has been executed even if no notice has been served. But the question of notice has a very important bearing on the

What is an actionable claim? What is necessary for its valid transfer and

* *Mulraj* v. *Vishwanath*, 37 Bom., 198 = 17 C. L. J., 162, P. C.

For what purposes is notice of such transfer essential? 1918 (Aug.) 1931 (July).

transferee's right. It has been provided in this section that "every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer, or has received *express notice* thereof), be valid as against such transfer." So we see that though the transfer of an actionable claim is complete without notice, yet the position of the transferee is not secure unless there be the necessary notice. The debtor, who, pays off the debt to the creditor, not having any such notice, *nor being a party to the transfer*, can successfully resist the claim of the transferee, [*Ramasami* v. *Chinnan*. 24 Mad., 449]; absence of notice protects him.

What is an actionable claim?—How may the right of the transferee of an actionable claim be affected by failure to give to the person against whom the claim is to be enforced notice of the transfer? B. L. 1911 (Jan.)

So long as proper notice is not served the debtor is not directly liable to the transferee.* It should be noticed that when the debtor is *a party to the transfer* he becomes liable even without *express* notice.

Illustration:—A owes money to B, who transfers the debt to C. B, then demands the debt from A, who, not having received notice of the transfer, as prescribed in Sec. 131, pays B. The payment is valid, and C cannot sue A for the debt.

Exception; Nothing in section 130 applies to the transfer of a marine or fire policy of insurance.

* *Sadasook Ramprotap* v. *Hoare Miller* & *Co.*, 41 C. L. J., 176.

N B.—The contract of life insurance is not exempted from the operation of this section. The reason of this difference is that while marine and fire insurances are contracts, of indemnity benefiting only the holder of the property at the time of loss, and not available to third persons by assignment, the benefit of a life-policy is enjoyable by any body to whom it has been assigned. In the case of a marine or fire insurance, the holder of the property is not liable to be easily defeated as he is the holder of the policy as well, (see sec. 135) but the transferee of a life-policy, unless he gives notice to the insuring company, may easily be defeated by a payment made by the company to the transferor. Hence, notice is important in the last case and not in the other two, and this accounts for the *exception.*

Illustration : A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor subject to the *proviso* above and to the provisions of Section 132.

How is the question of priority among several assignees of the same actionable claim determined?

Priorities: Some difficulty attaches to the question of determining priority between several assignees of the same actionable claim. Before the amendment introduced by Act II of 1900, there was some reason for maintaining that such priority was determinable according to the date of the service of the notice of the assignment on the original debtor. This is the law also in England. But we are inclined to think that the amendment

Is there any positive provision in the T. P. Act relating to this? B. L. (Int.). 1917 (Aug.)

has effected a distinct change of law. *There is no positive provision in the Act relating to this matter.* On the other hand, the transaction being complete on the execution of the requisite instrument, there remains nothing for a second assignment. Thus, there cannot be any competition between the two assignments, and the absence of competition necessarily obviates the question of priority. Cf. 13 Bom. L. R. 590.

Q. 1. A deposited with B in 1904 a policy of insurance on his life as security for the repayment of a debt owing by him to B. The deposit was unaccompanied by anything in writing. In 1909 A executed in favour of C a deed of assignment of the said policy in satisfaction of a debt due, and died shortly afterwards. Who as between B and C, will be entitled to the proceeds of the policy? B. L (Int.), 1914 (Jan.).

Ans. The deposit with B being unaccompanied by anything in writing is in contravention of the provisions of sec. 130; therefore, C will be entitled to it; see *Mulraj* v. *Vishwanath*, 17 C. L. J., 162 (P. C.) at p. 423, *ante*,

Q. 2: A executed a mortgage to B and subsequently B transferred the same to C with the consent of A but the instrument was not attested properly so as to constitute it a fresh mortgage in favour of C. Can the instrument be treated as a transfer of the earlier mortgage?—*Ans*: Yes; see *Arratoon Lucas* v. *Bank of Bengal*, 31 C. W. N. 179 (P. C).

Notice is to be in writing, and signed by the transferor. B. L. (Int.) 1917 (Aug.)

Sec. *131. Mode of Notice: Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorised in this behalf, or in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

In the absence of a valid notice under this section, a suit by an assignee of an actionable claim is not maintainable. For the purposes of this section, the name and address of the solicitor of the transferee cannot be taken as a substitute for the name and address of the transferee, see *Sadasook Ram Protap* v. *Hoare Miller & Co*, 41 C. L. J. 176.

Sec. 132. Transferee's liability: The transferee of an actionable claim shall take it subject to all the *liabilities* and *equities* to which the transferor was subject in respect thereof at the date of the transfer. [B. L. (Int.), 1927, Jan.]

Liability of transferee of actionable claim.

What is the liability fixed upon the transferee of an actionable claim? B. L. (Int.) 1926 (Jan.)

For example, when the debtor has a right of set-off against the transferor, the transferee will take the actionable claim subject to the debtor's such right.

Illustration:—(1) A transfers to C a debt due to him by B, A being then indebted to B, C sues B for the debt due by B to A. B is entitled to *set off* the debt due by A to him, although C was unaware of it at the date of the transfer.

(2) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

Discuss the rights and liabilities of a transferee of an actionable claim—when the debtor has a right of set-of against the transferor. B. L. (Int.) 1912 (Jan.) 1915 (July.)

Young v. **Kitchen**, 3 Ex Div., 127: The plaintiff who was the transferee of debt due on a contract, sued the transferor's debtor for it. The debtor's defence was that he was entitled to an equitable set-off in the shape of damages for which the transferor was liable to him for breach of the aforesaid contract. This claim of the debtor against the transferor was held to be a good answer to the transferee's suit.

N.B.—The statement that the assignee of an equity is bound by all the equities affecting it, is another way of saying that an assignee takes no better title than the assignor

Give illustrations of the general rule that the

assignee of an actionable claim takes no better title than his assignor. Indicate some exceptions to the rule. B. L. 1911 (July.) 1915 (July.)

had to convey. So the assignee of a share in partnership takes subject to the rights which arise from the relation between the assignor and his partners. As the assignor cannot without their consent introduce a stranger into the partnership, his assignee is not entitled to interfere in the management and must, as long as the partnership subsists, accept the accounts agreed to by the partners. He cannot, in the absence of fraud, go behind any settled account. But after dissolution the state of things is different. Then, he is entitled to an account from the date of the dissolution, and is not bound by any agreement which the partners may have made in disregard of his interest."

"An exception from the rule that the assignee takes no better title than his assignor possessed is recognised in the case of negotiable instruments which by sect. 137, are exempted from the operation of this Chapter"—Shephard and Brown.

Q. A assigns his dues under a bond executed in his favour by B to C for a sum of Rs. 450, the actual sum recoverable under the bond including principal and interest at that time being Rs. 500. B has a counter-claim against A on the basis of a hand-note executed by A in favour of B for Rs. 400. C sues B for the amount due under the bond. B contends (*a*) that C is not entitled to more than Rs. 450 which he had paid A for obtaining the transfer of the bond, and (*b*) that the sum due to him by A on the handnote should be set off against C's claim. Discuss the tenability of B's defence. (Cal. 1921, July)—*Ans*; (*a*) not tenable, because C purchases the entire claim of A against B; (*b*) tenable, see illustration (1) above, p. 427.

Q. A transfers to C a debt due to him by B. But A was also indebted to B, although C was unware of it at the date of the transfer. Is B entitled to set off the debt due by A to him in a suit by C against B for the debt due by B to A? Give your reasons. (All. 1926, Int.)—*Ans.* : Yes.

Warranty of solvency of

Warranty of the debtor's solvency: Every transfer of an actionable claim is not a guarantee of

the solvency of the debtor. But the transferee may for his safety, insist on a warranty being given by his transfesor as to the solvency of the debtor. So long as this express warranty is not given, the transferee failing to realise the debt from the debtor cannot fall back upon the transferor. A prudent transferee should, therefore, always demand a warranty, otherwise the transferor will not become liable to him. Sec. 133 has made provisions for such a warranty. debtor. Sec. 133.

Sec. 133. Where the transferor of a debt warrants the solvency of the debtor the warranty in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer and is limited, where the transfer is made for consideration to the amount or value of such consideration.

The warranty contemplated by this section is but a limited warranty inasmuch as (1) it is a warranty of *present* solvency only and not of *continued* solvency; (2) the warranty is up to the amount of consideration. So, if the transferee wants a greater warranty, so as to make the transferor liable beyond the scope of S. 133 he should make an express stipulation to that effect.

Mortgage of actionable claim.

Sec. 134. *Application of the mortgaged debt when realised*: When the mortgaged debt (*i.e.* debt which is transferred for the purpose of securing an *existing* or *future* debt) is received by the transferor (who has mortgaged the debt) or recovered by the transferee (*i.e.*, the mortgagee) it should be applied.

First, in payment of the costs of such recovery:

Secondly, in or towards satisfaction of the amount for the time being secured by the transfer:

Thirdly, if there be any residue after the above payments, it should be given to the transferor or his representatives-in-interest.

Indicate clearly the rights of a mortgagee of an actionable claim.

If the debt becomes irrecoverable in consequence of his default, can he be charged with the loss ?—Yes ? B. L. (Int.) 1912 (Jan.)

The mortgagee of an actionable claim has the same rights to deal with it as any other security. He may realise the debt, but he must credit the amount thus realised to the account of his transferor, and if there be any surplus after his claim has been satisfied he must make it over to the mortgagor. If the mortgagee however fails to realise the debt and the debt becomes irrecoverable in consequence of his default he may be charged with the amount of the loss; *Sham Kumari* v, *Rameswar*, 31 I. A. 146. The debt here may include a secured debt, provided the debt is separated from the security, 54 C. L. J. 117=35 C. W. N. 1034, P. C.

Assignment of rights under marine or fire policy of insurance.

Sec. 135. *The Right of an assignee of marine and fire policies*: Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment. shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

An assignee of fire or marine insurance can claim its benefit only if *absolute* ownership in the insured property is

vested in him. It is not sufficient to say that he has a mortgage over, or a leasehold interest in, the property, because that does not mean absolute ownership.

Sec. 136. *Incapacity of officers connected with Courts of Justice* : No Judge, legal practitioner, or officer, connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim and no Court of Justice shall enforce at his instance or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as *aforesaid.*

What classes of persons are prohibited from dealing in actionable claims? Why in your opinion should there have been an exception in their case. All. 1926 (*Int.*)

As the persons mentioned in the section occupy a position of great influence by reason of their superior knowledge and information about Court affairs, it is desirable to incapacitate them from trafficking in actionable claims otherwise these persons may be tempted to make profits out of the claims litigated about by abusing their position of power and influence to the detriment of litigant public. It is out of his public policy that the rule of this section has been enacted.

"In effect a claim ceases to be actionable in the hands of a Judge or legal practitioner who has bought it, and of any person deriving title from him. A Judge may without offence against this section accept an actionable claim bequeathed to him by will, or coming to him on the intestacy of a deceased person ; but if the assets of such person had to be distributed among several persons it is not clear that the Judge could safely agree to

receive actionable claims on account of his share." (Shephard and Brown).

Aghorenath v. Ramchurn, 23 Cal., 805 ; R. a pleader for the plaintiffs, had purchased, at an execution, plaintiffs' property in the name of his mohurer. The plaintiff's brought a suit against R for a declaration that the pleader-defendant, in so purchasing, was a trustee on their behalf and for an order directing R to reconvey the property to them, *Held*, the pleader could not, according to equity and good conscience, retain for his own benefit the property so purchased by him.

Saving of negotiable instruments etc.

By **Sec. 137.** Chapter viii (on actionable claims) has been declared to be inapplicable to stocks, shares or debentures, or instruments which are for the time being by law or custom negotiable, or to any mercantile document of title to goods (see p. 10).

This chapter has been rendered inapplicable to negotiable instruments and mercantile documents of title to goods ; therefore these documents can be transferred in violation of the formalities prescribed by the preceding rules. For the same reason, an assignee of these documents is not bound by the equities to which the assignor is subject.

The term "mercantile document of title" explained.

N. B.—The expression *mercantile document of title to goods* includes a bill of lading, dock warrant, ware-house-keeper's certificate, railway receipt, warrant order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

A *bill of lading* is a receipt for goods taken on a ship. It is signed by the master or the ship's broker and contains a statement of the terms of the *contract.*

A *dock-warrant* is a document issued by the proprietors of a dock with whom goods have been deposited by a shipper or ship-owner and authorises the holder to take delivery of the goods described therein. It is assigned by endorsement.

If several dock-warrants are issued, the property in the goods vests in the holder who first obtains delivery.

N.B.—The following is the last section of the Transfer of Property (Amendment) Act, xx of 1929, and has been enacted to restrict the retrospective operation of the new provisions introduced into the Act.

63. Nothing in any of the following provisions of this Act, namely, sections 3, 4, 9, 10, 15, 18, 19, 27, 30, clause (*c*) of section 31, sections 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect— **Saving clause**

(*a*) the terms or incidents of any transfer of property made or effected before the first day of April, 1930.

(*b*) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,

(*c*) any right, title, obligation or liability already acquired, accrued or incurred before such date, or

(*d*) any remedy or proceeding in respect of such right, title, obligation or liability;

and nothing in any other provision of this Act shall render invalid or in any

way affect anything already done before the first day of April, 1930, in any proceeding pending in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

Note: The Act xx of 1929, which is in operation from 1st day of April, 1930, lays down the above provision to keep in tact all transactions (and the rights and liabilities thereunder) from the effect of the newly introduced amendments. The sections specified above are those of Act xx of 1929 and refer to amendments of the sections of the Transfer of Property Act as hereunder shown.

Act xx.	T. P. Act.	Act xx.	T. P. Act.
3	2	33	68
4	3	34	69
9	15	35	69A
10	16, 17, 18	46	91
15	53	52	102
18	56	55	107
19	58	57	111 (g)
27	63A	58	114A
30	65A	59	119
31(c)	67(a)	61	129
32	67A	62	130

APPENDIX.

QUESTIONS.

1. State the rule of Fixtures as laid down in the T. P. Act, (Mad. 1908)—pp. 9 & 373.

2. Define an "actionable claim". Are the following actionable claims : (*a*) claims for damages accruing after breach of contract, (*b*) a decree of a Court ? (Cal. 1915. July),—pp. 9-11.

3. Explain fully what is meant by *notice.*—Cal. 1930, Nov.—p. 12.

4. Explain "actual notice," "constructive notice," "imputed notice." Give examples. (Cal. 1922, Jan.)—pp. 12-16.

5. When is a person said to have "notice of a fact" ? Illustrate the different forms of constructive notice.—Cal. 1925, July.—p. 13.

6. Distinguish between actual and constructive notice, giving typical cases to illustrate your answer, (Cal. 1927, July) —pp. 12-13.

7. State who are competent to make a transfer of property (p. 33) ; and if a transfer by one who has no title can ever confer title on the transferee. (Cal. 1916, July)—p. 102.

8. What kinds of transfer are outside the provisions of the T P. Act ? (B. L. 1922, July ; 1929, July ; 1930, July) —pp. 26-33.

9. State and explain the definition of Transfer of Property as given in the T. P. Act, and mention five out of the different kinds of property which are mentioned therein as non-transferable —(Cal. 1924, July ; 1925, July.)—pp. 26-33.

10. What is the nature and character of the property dealt with in the T. P. Act ? (p. 26) Would the following properties come within he scope and purview of the Act ?—

(*a*) An electric ceiling fan in a house ; (*b*) a mortgage debt ; (*c*) standing timber ; (*d*) equity of redemption.—Cal. 1930, July.—**Ans** : Property of ***any kind*** may be transferred unless excluded by sec. 6. Some sections apply to both moveable and immoveable and some sections apply to immoveable property only : (*a*) fixture, (*b*) immoveable, (*c*) moveable, (*d*) immoveable.

11. Are there any limitations on the power to transfer future or possible interests in property under the T. P. Act. (Cal. 1931, Jan.)—see p. 25.

12 (*a*) Explain the expression "immoveable property". (*b*) Would you classify the following as immoveable property : (i) equity of redemption, (ii) the interest of a mortgagee of immoveable property (iii) a decree for sale on foot of a mortgage, and (iv) a right to light and air ? Give reasons for your answer briefly. (All. 1927, *Int.*).

13. State (*a*) what kinds of transfer are contemplated in the T. P. Act, (*b*) what kinds are outside its scope, and (*c*) what persons are competent to make valid transfers—(Cal 1929, July.) See secs. 6 & 7.

14. A transfers his right to receive offerings in a Hindu temple to B. Does the transferee acquire any right ; (All. 1926, *Ext.*)—**Ans.** No, but for *pala* in the Kalighat temple, see p. 31.

15. What is an actionable claim ? Is right to sue for damages for breach of a contract an actionable claim ? Shew how an actionable claim can be transferred, stating the rights and liabilities of the transferee.—(Cal. 1929, July).

16. Are the following transferable, and if so, to what extent in each case :—

(i) a right of way over another's land, (ii) a religious office, and (iii) a decree for pre-emption (All. 1927, Int.).

Ans : (i) a right of way is an easement which cannot be transferred apart from the dominant heritage, (ii) not transferable, see sec. 6 (*d*) ; (iii) is transferable (see 24 All. 119), although a right of pre-emption is not.

17. "A mere right to sue cannot be transferred." Explain (p. 29). What is the difference between 'a mere right to sue' and an 'actionable claim'? Give illustrations: (Cal. 1930, Nov.)—**Ans.** The difference is virtually the same as between a "*dispute*" and a "*matter* in dispute". For illustrations, see p. 29.

18. Mention some kinds of property which cannot be transferred (p 26). Discuss if the following are transferable: (*a*) right to sue for damages for breach of contract; (*b*) a contingent remainder; (*c*) right of a reversioner to inherit after a Hindu widow's death.—(Cal. 1918, Aug.)

Ans: (*a*) No; p. 29: (*b*) No; p, 66: (*c*) No; mere *spes successionis*, p. 27.

19. Can a man mortgage his undivided share in joint property, (All. 1921),—Yes.

20. A executed a deed of sale in favour of a minor B. Is the sale valid? Discuss—see p. 34.

21. Mention some properties which cannot be transferred and some persons who cannot transfer any property at all, (Cal. 1920, Jan.)—See Qq. 8-10, above.

22. A Hindu widow institutes a suit for—(*a*) arrears of maintenance due under a former contract, (*b*) declaration of her right to receive maintenance. Can her heirs continue the suit, and if so, to what extent? [Cal. 1923, July]—**Ans**: Arrears of maintenance *i.e.* past maintenance, are excluded from cl. (*dd*) of sec. 6, see p. 28 and pass on to the heirs. (*b*) a right to future maintenance is personal; therefore the heirs cannot ask for the declaration, except in so far as the declaration is necessary to maintain a suit for *past* maintenance.

23. A transfers his house to B. What passes under the transfer. (All. 1927, Int.)—see sec. 8.

24. Specify, with reasons, the transfers expressly disallowed by the general rule of the T. P. Act. (Cal. 1921, July.),—see pp. 26, *et seq*.

25. State and explain the general provision of the T. P. A. fixing the operation of a transfer with regard to the

quantum of interest passed in the property and its legal incidents. (Cal. 1921, July) :—**Ans** : A transfer passes all the interests of the transferor in the property with all the legal incidents thereof unless a contrary intention is evinced (sec. 8).

26. What are the limits within which transfer of property subject to a condition can be validly made under the T. P. Act ?—Cal. 1921, July.

27. In what cases is a condition restraining the transferee of property from making any alienation valid and in what cases it is not ? (Cal. 1900)—pp. 37-38.

28. To what extent can a transferor of land validly restrict the rights of the transferee (*a*) to transfer the land (s. 10) and (*b*) to use it as he pleases ? (s. 11)—(All. 1924).

29. Write a note on "condition in restraint of *alienation* and *use*" on transfer of property. (Cal. 1930, Nov.): *Vide* last question.

30. State and explain the provisions of the T. P. Act relating to transfers subject to a condition or limitation. What is the distinction between a condition and a limitation. (Cal. 1922, January). **Ans** : (ii) A condition restraining the transferee's power of alienation is bad except in the case of a lease and a European married lady, (2) limitation on the transferee's power of enjoyment, except in the case of restrictive covenants for the beneficial enjoyment of the transferor's property is bad, (3) condition limiting right till bankruptcy or attempted alienation (case of sub-lease excepted) is bad.

'Condition' and 'limitation' are used in the Act almost synonymously to denote any kind of *restraint*, see sec. 10 ; but 'condition' has reference to an uncertain event and limitation to positive curtailment or abridgement of right.

31. "A transferee of property who takes an absolute interest cannot be restrained in his enjoyment or disposition of it by any condition inserted in the transfer." Is there any exception to this general rule ? Explain with illustrations. (Cal. 1926, July).

32. What are the limits within which transfers of pro-

pery subject to a condition can be validly made under the T. P. Act (Cal. 1927. July). Illustrate by examples the the principle that a condition precedent has only to be substantially complied with but a condition subsequent must be strictly fulfilled, (Cal. 1932, Jan.).—see pp. 75 & 79.

33. Discuss the rules in the T P. Act relating to creation of interests in favour of persons not in existence at the date of the transfer, pointing out when they would be valid and when invalid ?—Cal. 1925 (Jan.); 1925 (July) ; 1928 (Jan). 1929 July).

34. Explain and illustrate the legal effect of conditions restraining alienation (p. 37) and restrictions repugnant to the interests created (p. 39).—(Cal 1925, Jan.).

35. State accurately the purport of any one of the sections of the T. P. Act enacted to encourage free alienation and circulation of property and discourage repugnant conditions and restrictions attached to transfers. Illustrate your answer by examples. (Cal. 1929. July).--pp. 37 *et seq.*

36. On what principle may registration be regarded as notice ?—(Cal. 1920, July)—See p. 15.

37. Does registration of the document affecting immoveable property operate as notice to a subsequent transferee ? (Cal. 1910, Jan.)—p. 15.

38. Distinguish between a vested and a contingent interest. How does this distinction operate upon the devolution of the property transferred ? (Cal. 1925, Jan.; 1926, July)—pp. 67-68.

39. A transferee of property who takes an absolute interest cannot be restrained in his enjoyment or disposition of it by any condition inserted in the transfer." Is there any exceptions to this general rule ? Explain with illustrations, (Cal. 1926, July).—see pp 37-38, 40.

40. When you give a property to a person absolutely you cannot tell him how he is to enjoy it. Is there any exception to this rule ? Explain with illustrations ?—(Cal. 1927, Jan.)—See p. 40.

41. Differentiate between *vested* and *contingent* re-

mainder. Which of the two is transferable and why? (Cal. 1917, August; 1921, Jan.; 1929, Jan.)—p. 67.

42. Explain with illustrations the difference between a vested and a contingent interest. (Cal. 1922, July)—p. 67.

43. Give an instance of a person obtaining, by a transfer, a vested interest in a property without being entitled to the present enjoyment thereof. (*b*) Property is transferred to A for life and after his death to B. B dies during the life-time of A. How would the property devolve on the death of A? (Cal. 1931, July)—**Ans**: B gets a vested interest which passes on his death to his heirs.

44. Define a vested and a contignent interest and state if, in either case, in the event of the transferee dying before the estate falls into possession, the interest devolves upon his legal representative. (Cal. 1916, July)—p. 65 *et seq.*

45. State the rule against perpetuity applicable to a transfer of property *inter vivos*. To what extent, if any, is it applicable to Hindus? (Mad. 1915)—pp. 45.

46. A gift is made to A to be given to him at the age of 18. What interest does A take? (Cal. 1921, Jan.)—He takes a vasted interest.

47. How far has the rule of Hindu Law, as expressed in the Tagore case, against gifts to unborn persons, been modified by recent Legislation?—**Ans.** pp. 51-52.

48. Discuss whether a gift to an unborn person is valid under the Hindu Law. Cal. 1918 (Jan).

49. State with reference to decided cases and statutes how far the law relating to gifts to unborn persons in T. P. Act applies to Hindus (Cal. 1927, July).—**Ans**: Yes; applies *in toto*.

50. State the rules laid down in the T. P. Act as regards imposition of the condition on the transferee and explain the reasons on which these rules are based. (Mad. 1912)—see pp. 72-76.

51. Explain and illustrate "No transfer can be made in so far as it is opposed to the nature of the interest affected thereby," (Cal. 1910, July; All. 1903) All. 1922—p. 23.

52. Explain and illustrate the legal effect of (*a*) conditions restraining alienation and restrictions repugnant to the interest created or (*b*) transfers for the benefit of unborn persons pointing out clearly when they are valid and when invalid. (Cal. 1924, July)

53. A sells a plot of land to B and there is a clause in the conveyance to the effect that a certain plot "should never be hereafter sold, but should be left for the common benefit of both parties and their successors." Discuss how far this clause would restrain the transferee in disposing of the plot thus agreed to be left in the state in which it was at the date of the conveyance.—Cal. 1928 (Jan.)—**Ans**: Notwith standing the restriction, the transferee is at liberty to dispose of the property; but the condition to leave the property in its existing state is valid, see *McLean* v. *Mckay*, at p. 41, *ante*.

54. Can the owner of a village create therein a life-interest for the benefit of an unborn person? (All. 1903)—No; see pp. 44-45.

55. State the rule regulating the transfer of property to unborn persons. (Mad. 1905, 09—see p. 45.

56. What are the conditions under which a property may be validly transferred to an unborn person? (Cal. 1918, Aug.)—p. 45.

57. A makes a gift of land to B, a bachelor, for life and then to B's son, if he has one, when the latter shall have attained the age of 20 Within two years of the gift B marries and has a son, who, in point of fact, attains the age of 20 at B's death. Can the gift in favour of B's son take effect? (Mad., 1911).—See p. 48 & 54.

58. Carefully expound the rule against perpetuity as it applies to transfers of property. What transfers are exempt from the operation of the rule?—(Cal. 1926, July; Cal. 1932, Jan).

59. Write a short note, containing illustrations on the rule against perpetuity, (Cal., 1930, July).

60. Explain the rule against perpetuity. In determining whether a gift is good or bad according to the Law

of Perpetuity, regard is to be had to possible and not to actual events"—Explain with illustrations.—Cal. 1926, Jan.—N. B. Obviously, the question is taken from p. 48, *ante.*

61. "In the rule against remoteness, reference has to be made to possible and not to actual events." Explain. Is a gift to the unborn son of A, should he marry, valid ? Give reasons. (Cal. 1918, Aug.)—No : see p. 48.

62. Discuss the validity of the following gifts to unborn persons—(a) a gift to A for life, and afterwards to the eldest son (unborn) of B and (*b*) a gift to A for life and afterwards to the eldest son (unborn) of A who should marry. (Cal. 1921, Jan.)—**Ans** : (*a*) Valid, provided B's son is born during the lifetime of A.—pp. 44-45. (*b*) Here is a contingency upon a contingency. The first contingency is that A should have a son, the second is that that son should marry. It is possible that A would marry after attainment of majority. So the actual vesting may be put off beyond the unborn son's minority. This mere possibility will vitiate the transfer.—p. 48.

63. State the rule enacted in the T. P. Act regarding an interest created for the benefit of a class of persons with regard to some of whom it fails by reason of remoteness ; (Cal. 1916, Jan)—p p. 54-58.

64. What is the reason of the rule in regard to gift to a class ? (Cal. 1918, Aug.)—p. 54.

65. X makes a gift in favour of A for life, afterwards to A's eldest son (unborn) for life, and then to B, a person in existence at the time of the transfer. Is the transfer to B valid ? Give reasons. (Cal. 1918, Aug.)—**Ans.** See Section 16, p. 58.

66. What kinds of transfer are exempted from the rule against perpetuity ? (p. 51). And upon what principles ? Explain the doctrine of *Cy pres*, and the limit to the same (Cal. 1896)—p. 75.

67. Does the rule against perpetuity apply to transfer in perpetuity for the benefit of the public ? (Cal. 1920, July). See p. 63.

68. A transfers a farm to B subject to the condition—(*a*) that if B does not go to England within three years after the date of transfer, or (*b*) that if B endeavours to transfer or dispose of the same or (*c*) that if B does not desert his wife within three months,—B's interest in the farm will cease. Discuss the legal effect of the conditional transfer in each case. (C. U. 1914, Jan.). **Ans** : (*a*) p. 81; (*b*) the limitation is invalid. See sec. 12, p. 42 ; also p 81 ; (*c*), p. 80.

69. Distinguish between a vested and a contingent interest (p. 67-68). How does this distinction operate upon the devolution of property transferred ? (Cal. 1923, July)—(see Cl. 2, p. 68).

70. Explain and illustrate the difference between a vested remainder and a contingent remainder. [see pp. 67-68]. Does the rule against Perpetuity apply to the former ? (No.) A gift is made to A to be given to him at the age of 18. Does A take a vested or contingent interest ? (Cal. 1918, Aug.) **Ans** : A takes a vested interest.

71. Explain the doctrine of *Cypres* (p. 57), and the limitations to the same (p. 75) : (Cal. 1899 ; Mad. 1902, 05, 08 ; Bom. 1901).

72. State the principle of 'Election' as laid down in the T. P. Act. Illustrate your answers by an example. (Cal. 1918 ; Jan.)—pp. 84-87.

73. Explain with illustration the doctrine of Election as laid down in the T. P. Act (p. 83) and its exception (p. 84), (Cal. 1928 July).

74. A sells to B, C and D a house situate in a town and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase money and C and D one quarter each. When and how should the liability of E be apportioned in this case ? (Cal. 1921, July)—p. 89-90.

75. When are covenants said to run with the land? State if there are any such covenants mentioned in the T. P. Act. Distinguish between covenants running with the land and other restrictive covenants affecting land. (All. 1927 Ext.).

76. What persons are incompetent to transfer property

of which they are owners ? What persons are authorised to transfer property of which they are not owners or full owners ? What amounts, under T. P. Act, to exclusive proof of the existence of the circumstances under which alone these persons are authorised to transfer ? Describe the nature of the circumstances, and mention some of them. (Cal. 1897). **Ans** : A person incompetent to contract cannot transfer. For transfers by limited owners, see sec. 38. For transfers by ostensible owners and unauthorised persons see secs. 41-43.

77. State and illustrate the rules for determining the validity of a transfer by an ostensible owner ; (Cal. 1917, Jan. and 1932, Jan.)—p. 102-04.

78. State the rule as to validity of transfer by an ostensible owner. Discuss the principle of the rule by reference to any decided case on the subject, (Cal. 1923, Jan.)—See *Ram Coomar* v. *McQueen*, pp. 103-04.

79. What are the elements necessary to make a transfer by an ostensible owner binding on the real owner ? (p. 103) What is the underlying principle in such cases ?—Cal. 1929, (Jan.) (p. 103).

80. A purchases some land in the name of his servant. The servant representing himself to be the owner sells the land to B. State under what circumstances B will get a good title as against A.—Cal. 1919 (Jan).—**Ans** : The servant here becomes an ostensible owner and sec. 41, accordingly, applies to the case.

81. Explain and illustrate "a covenant running with the land", (Cal. 1923, July)—p. 101.

83 Explain and discuss the doctrine of "feeding the estoppel" in the light of sec. 43 of the T. P. A. (Cal. 1923 July ; 1927, July)—p. 109.

84. Write a short note on the doctrine of "feeding the estoppel"—p. 109.

85. Can a transfer by a person having no title, or having a defective title pass good title in any circumstances ? (Cal.

1922, Jan.)? **Ans**: If the person subsequently acquires a valid title.

86. A Hindu widow is in possession of her husband's estate. Her daughter's son X, sells his reversionary interest in this estate to Z. Ten years later the widow dies and X succeeds to the estate. Is the sale in favour of Z valid, and can he obtain possession of the property transferred by suit? [All. 1922]—**Ans**: The transfer is that of a mere *spes successionis*, and cannot be validated by the doctrine of feeding the estoppel, see 48 Cal. 536 and 41 Mad. 418 (F. B.) cited at p. 109-110.

87. A, a Hindu died leaving property X, a widow, W, as heir and a brother B, as a presumtive reversionary heir. During the life time of W, B representing that he was the owner of it, sold X to C who obtained possession. After the death of W and when C was in actual possession of X, B sold it to D. Discuss the question of the rights of C and D respectively to the property (Cal. 1931, July).—**Ans**: Here specific immoveable property and not the mere *spec successionis* is transferred; therefore sec. 43 applies. The ruling of *Annada Mohan* v. *Gour Mohan* (see p. 110) ought not to apply to this case. The recent Nagpur case of *Bismilla* v. *Manulal*, A. I. R. 1931 Nag. 51. seems to have taken a right view in the matter. Cf. The P. C. case of *Tilakdhari* v. *Khedanlal*, 48 Cal., 1 (P. C.).

88. What is the principle which is sometimes referred to as "feeding the grant by estoppel"? Discuss its applicability in the case of a transfer of the interest of a Hindu reversioner expectant on the death of a qualified owner. (Cal. 1922 Jan. and 1923, July)—pp. 109—110.

89. Explain clearly the principle, with reference to a leading case, underlying the transfer of property by an unauthorised person who subsequently acquires interest in the property transferred. (Cal. 1930, July).—p. 107.

90. Can a benamdar maintain an action in ejectment? (Cal. 1922, Jan.). **Ans**. Yes, see 23 C. W. N. 521 (P. C.).

91. Write a short note on Apportionment; (Mad. 1908).

92. What are the rights of a *bona fide* transferee of an immoveable property in regard to improvements made by him as against a person with superior title evicting him therefrom? (Cal. 1921, Jan.)—p. 122.

93. In what circumstances is a person in possession of property not being a mortgagee or lessee entitled to the value of improvements made by him? (Mad. 1914).

94. State the rule laid down in the T. P. Act regarding priority of rights created by transfers at different times." (Cal. 1920, July)—p. 116.

96. Explain and illustrate the doctrine of *Lis Pendens* (All. 1904; Mad. 06, 08. 14)—p. 124. Point out the principle on which it rests—(Cal 1929, Jan).—**Ans**: It rests on the principle of finality of litigation.

97. Explain the doctrine *lis pendens.* (Cal. 1932, Jan.). A transfer was made in the interval between a final decree and the institution of an appeal from that decree. Discuss, if the doctrine of *lis pendens* will apply in such a case. (Cal. 1926, Jan.)—p. 127.

98. Discuss if a purchaser in execution of a decree is affected by the doctrine; (Cal. 1915, Jan.)—**Ans**: *Lis* applies to sales *in invitum*;—p. 131-32. [Also see Q.102, *infra.*]

99. Discuss the doctrine of *lis pendens* as laid down in the case of *Bellamy* v. *Sabine*, 1 De G. and J., 566, and as codified in sec. 52 of the T. P. Act. (Cal. 1916, Jan.; 1923, Jan.; 1924, July; 1925, July.)—See pp. 20—22, 125,

100. State the rule of *lis pendens* with particular reference to the commencement, continuation and termination of the *lis* and examine the fundamental principle upon which the rule is based. (Cal. 1917, Jan.)

101. State and analyse the law laid down in the T. P. Act regarding transfer of property pending a suit relating thereto, (Cal. 1924 Jan.)

102. Explain the doctrine of *lis pendens* and examine if the principle has any application to sales *in invitum.* Does the *lis* extend to the proceedings in execution of the decree?—(Cal. 1927, Jan.).—*Ans*: *Lispendens* being based

on the principle of finality to litigalion, it applies to sales *in invitum*, otherwise the intended finality would not be achieved. *Lis*, under the amendment of 1929, applies to execution proceedings.

103. What is the reason of the rule in regard to the doctrine of *lis pendens?* (see p. 125). Would the rule apply (*a*) to an involuntary sale; (*b*) to a transfer by a person who subsequently to the transfer is added as a party to the leading suit; (*c*) to a transfer after decree by the first Court but before appeal? (Cal. 1918, Aug.)—(*a*) p. 131; (*b*) p. 131; (*c*) p. 127.

105. Explain the doctrine of *Lis Pendens.* A transfer was made in the interval between a final decree and the institution of an appeal from the decree. Discuss if the doctrine of *Lis Pendens* will apply in such a case.—(Cal. 1928, Jan.)—**Ans.** Yes; *Lis pendens* applies; for reasons *vide* at p. 127.

106. A held a decree for sale of property which had been mortgaged to him by an instrument which was not compulsorily registrable and which was not registered. B purchased the same property *pendente lite* by a registered deed of sale. Whose rights will prevail, (Cal. 1922, Jan.): **Ans**: B's rights being acquired *pendente lite* cannot prevail as against A's.

107. Is a transfer of immoveable property made with intent to defeat or delay creditors void or voidable?—Cal. 1930 (July)—**Ans**: It is only voidable (p. 137).

108. Under what circumstances is a transfer of property looked upon as fraudulent as against creditors of the transferor? (Cal. 1914, July)—See pp. 133, *et seq.*

109. Answer with reference to leading cases (*a*) if a transfer of immoveable property *for value* to a person who has knowledge of an impending execution against the transferor and (*b*) a transfer to one of several creditors of the entire immoveable property of the debtor are voidable as being transfers to defeat or delay creditors within the meaning of sec. 53 of the T. P. Act, (Cal. 1929, July)—**Ans**: (*a*) the transaction will be protected if *bona fide*;

mere knowledge, of the execution proceeding does not make it *mala fide*: (p. 138). (*b*) A transfer to a creditor for *past* debts is valid (p. 140).

110. Discuss the law laid down in *Mushar Sahoo* v. *Lala Hakimlal*, 33 C. L. J., 406. (Cal. 1924, Jan.)—p. 140.

111. Explain what is meant by "transfer in good faith" within the meaning of sec. 53 of the T. P. Act.—(Cal. 1929, Jan.)

112. Discuss the rule as to the question of the validity of a conveyance impeached as a fraud upon creditors as laid down in the case of *Hakim Lal* v. *Mooshahar Shahu* (34 Cal. 999—Cal. 1928 (Jan.)—p. 140.

113. What remedy is open to a creditor against the transferee of the debtor's properties for consideration who has notice of the fraudulent intent of the debtor to defraud his creditors? (See Qq. 7-8; pp. 145-46). Does it make any difference if the transferee is a creditor of the transferor? If so, what? (Q. 5; p. 145.)

114. What is a fraudulent transfer? [see sec. 53]. Who are entitled to question such a transfer? **Ans**: Creditors; A subsequent transferee can avoid a fraudulent gratuitous transfer. (Cal. 1919, July).

115. Explain and enunciate, the principles laid down in *Jadunath* v. *Ruplal*.—(Cal. 1926, Jan.)—see at p. 149.

116. Write a short note on the system of *benami* transfers. A makes a *benami* transfer of a property to B, with a view to defrauding his creditors. B afterwards sets up title to the property, claiming it himself. Can A recover the property from B? Will it make any difference whether the creditors are actually defrauded or not? Support your answer by reference to decided cases.—(Cal. 1927, July)—*Vide* Q. 17 at p. 148.

117. "In the absence of a law of bankruptcy a preferential transfer of property to one creditor cannot be declared fraudulent as to other creditors although the debtor in making it intended to defeat their claims and

the creditors had knowledge of such intention"—Is this a correct proposition of law? What would be your view if the transferee in the above is one who purchases for a present consideration? (Cal. 1928, July)—**Ans**: Yes; a correct proposition. If there is a present consideration, there is no preferential repayment of a creditor, and consequently, the transfer will be considered fraudulent within the meaning of section 53.

118. Does ownership pass by a contract of sale of land accompanied with part payment? Is there any difference on this point in English law?—(Cal. 1919, Aug.)—p. 168.

119. Will a registered bond relating to moveable property have priority over a prior unregistered bond relating to the same property? Give reasons for your answer.—(Cal. 1926, July; 1928, Jan.)—pp. 162-63.

120. Do the rights of a purchaser after a contract to sell but before conveyance, differ in India from those of a purchaser in England? And if so, in what respects (Mad. 1910)? —*Vide* Q, 118.

121. What are the rights of a purchaser under a contract for sale? Is there any difference between the Eng. law and the Ind. law on the point? (Cal. 1923. Jan.; 1925, Jan.)—p. 168.

122. Is the doctrine of equitable ownership recognised in the T. P. Act?—(Cal. 1920, Jan.)—No, see p. 168 & 182.

123. Would a sale of immoveable property by a Hindu effected by mere delivery of possession be valid under T. P. Act? [All. 1016 (Ext)]: **Ans**: Only if the property is worth less than Rs. 100. The law of sale contained in T. P. Act applies to the Hindus in its entirety.

124. A by an unregistered written agreement promises to execute and register a sale deed in respect of his house with Rs. 10.000, in favour of B as soon as the latter should pay the price. Discuss the validity of the transaction. (Cal. 1921, July).—see pp. 167-68.

125. A agrees to buy a house from B, and pays the consideration. But before the conveyance is executed, the house is destroyed by fire. What remedies, if any, would A have against B ? (Cal. 1922, Jan.)—**Ans** : As no ownership of the property has yet passed to him, he can cancel the transaction and recover his advances ; see p. 182 ; see also Q. 1, p. 183.

126. What duty or duties has or have been cast by law upon the seller and buyer, omission to discharge which has been declared to be fraudulent ?—pp. 172, *et. seq.*

127. What remedy or remedies is or are open to the parties when such omission or omissions is or are discovered after sale ? (Cal. 1914, July)—**Ans** :—It may be set aside ; *Mostyn* v. *West Mostyn Coal Co.*, I. C. P. D. 145].

128. A sells a plot of land to B. It is stated in the conveyance that there is a tenant-at-will on the land. After the sale is completed it is found that the tenant had acquired a right of occupancy in the land and he is, therefore, not liable to be evicted. What is the remedy open to B ? Fully discuss the principles of law involved in the case. (Cal. 1230, July) : **Ans** ; B can rescind the contract, see *Vishwanath* v. *Bala Kaku*, 18 Bom. L. R. 292=34 I. C. 147 ; *Caballers* v. *Henty*, 9 Ch. 447.

129. Explain the principle of *Caveat emptor.* Does the T. P. Act intreduce any modification of the above principle ? All. 1925.—p. 178.

130. What covenant or covenants has or have been expressly declared by law to run with the land in cases of sale ? (Cal. 1914, July).

131. What do you understand by covenants for title in cases of sale of immoveable property, and what remedies are open to the buyer for breach of such covenant ? (Cal. 1917, Jan.)—p. 178.

132. What are the rights of a vendor in respect of the property sold, when the whole of the purchase-money has not been paid ? (Cal. 1923, Jan.)—**Ans** : He has a lien for his unpaid purchase money ; *vide* p. 179.

133. What facts are the buyer and the seller of an immoveable property bound, in the absence of any contract to the contrary, to disclose to each other and on the non-disclosure of which the sale is liable to be cancelled? Is the buyer bound to disclose that there is a valuable mine on the property unknown to the vendor? (Cal. 1912, July),—p. 175 and p. 179.

134. "A conveyance of non-existent property may, when made for valid considerations be valid as a contract," Discuss.—(Cal. 1925, Jan.; 1928, Jan.; 1932, Jan.)—p. 25-26 & 189

135. Can there be a mortgage of property which is not in existence at the time? (Cal. 1927, July)—p. 189-90.

136. What are the liabilities of the seller of an immoveable property in regard to (*a*) defects in the property and (*b*) covenant for title? (Cal. 1921, Jan.)—[pp. 175 & 178.]—The buyer knows but the seller does not, that there is a mine in the land which is being sold. Is the buyer bound to disclose the fact to the seller? (Cal. 1921, Jan.)—p. 181.

137. A, having contracted to sell a farm to B lets him into possession pending the conveyance. A's title is proved to be defective. What are B's rights and liabilities under the T. P. Act in respect of his occupation of the farm? (Mad. 1903).—**Ans**: B can avoid the contract and is entitled to compensation. He is liable to refund the rents and profits he has realised, For such rents and profits he is a mere trustee for A; see sec. 55.

138. A enters into an open contract to sell certain immoveable property to B for a given price, the sale is to be completed in six weeks' time. What has each party to do? Who is entitled to the rents and profits in the meanwhile? What is a covenant for title and who is entitled to enforce it?—(Cal. 1926, July).

139. What are the formalities to be observed for the creation of a valid mortgage? (pp. 209-10.). Do you know of any kind of mortgage which may be effected without the execution of any document whatsoever? [Cal. 1928, (July)]

[Mortgage by delivery of possession in respect of property worth less than Rs. 100, and mortgage by deposit of title deed].

140. What is attestation; (Cal. 1920, July,)—[p. 22.] What are the essential requisites of a valid mortgage under the T. P. Act? (Cal. 1918, Jan.).

141. Witnesses to a mortgage deed were not present at the time of the execution of the mortgage but they had put their names on the acknowledgment of the executant. Is this a proper attestation within the meaning of sec. 59, T. P. Act?—**Ans.** Yes, pp. 23 & 212.

142. Define (*i*) a mortgage by conditional sale and (*ii*) anomalous mortgage under the T. P. Act (Mad. 1915)—pp. 192 & 207.

143. A mortgages his property to B by an unregistered deed for a sum less than Rs. 100; subsequently A mortgages the same property to C by a registered deed. C has knowledge of the prior deed at the time of his mortgage. B in execution of his decree which he obtains in a suit on his mortgage to which C is not made a party purchases the property himself. Discuss the respective rights of C and B so far as the property is concerned.—**Ans**: See pp. 209-10. 'A simple mortgagee by an unregistered deed (even when for less than Rs. 100) is invalid.' So what B purchased was the right, title and interest of A, *i.e.* his right of redemption; therefore C's rights are unaffected.

145. What are the different classes of mortgage recognised in T. P. Act. [p. 190] Is the classification contained in Sec. 58 exhaustive? (Cal. 1927, July)—[N. B: The classification in sec. 58 as it stands at present after the amendment of 1929 is fairly exhaustive].

146. State the interests transferred by, and the respective remedies of the mortgagees in the different kinds of mortgage enumerated in the Transfer of Property Act, (Cal. 1922, July).—**Ans**: (*a*) For the *interests*, read the analysis of the six kinds of mortgages at pp. 190. (*b*) For the remedies, *vide* pp. 267-68.

147. Define mortgage (p. 188). A sale deed contains a stipulation for reconveyance by a certain date. Discuss whether the vendor can exercise the right of redemption such as a mortgagor enjoys after the expiry of the date, [Cal. 1923, Jan. 1925 (July)] :—**Ans** : It is a genuine sale and no mortgage by conditional sale ; therefore, there is no right of redemption ; time is here very essential, see p. 195.

148. A, wishing to borrow money from B on security, deposits his title-deeds with him. B thereupon advances the money, and immediately afterwards gets a formal mortgage deed executed. The deed, however, is not registered. Can B recover on his security ?—Cal. 1927 (July.)—[See p. 206] ;

149. A registered mortgage is attested by one witness only. What remedy is open to the mortgagee in such a case ?—(Cal. 1914, July).—**Ans.** A simple money decree, see 26 Cal., 222 and p. 211.

151. A executes a simple mortgage and then transfers the property to B. On sale of the property in execution of the mortgage decree, the whole amount of the mortgage debt is not realised. What is the remedy of the mortgagee for recovering the balance of the debt ? (Cal. 1921, Jan.)—**Ans.** The mortgagee can ask for a personal decree against A ; see p 192.

152 A property subject to two successive mortgages is sold in execution of a decree obtained by the first mortgagee in a suit in which the puisne mortgagee was not made a party, and purchased by a third person. What are the rights and liabilities of the purchaser and the puisne mortgagee as against each other ?

If the decree obtained by the first mortgagee was allowed to be barred, would the sale in execution of the decree obtained by the puisne mortgagee be subject to the prior mortgage ? [Cal. 1922, July] :—**Ans.** (i) The puisne mortgagee can redeem the property from the purchaser, as the decree and the purchase do not bind him ; [*Cf.* 39 I. A 68=16 C.W. N. 505 and 30 Cal. 599=7. C. W. N. 766] (*ii*) No.

154. When is the right of redemption extinguished (p. 236). A and B having equal shares in a property mortgage it to a person who afterwards acquires the interest of A in the property. Can B thereafter redeem his interest on payment of the proportionate share of the mortgage debt? Give reasons. (Cal. 1915, Jan.)—p. 227.

155. In execution of a decree for rent, a mortgagee purchases a part of the mortgaged property. The remaining portion of the mortgaged property is purchased by two other persons. The mortgagee brings a suit for the enforcement of his mortgage. Will the purchasers of the remaining portion of the mortgaged property be entitled to redeem their respective shares on payment of proportionate parts of the mortgaged debt? (Cal. 1930, July)—Yes.

156. A subsequent mortgage is not by reason merely of its having been effected by a registered instrument entitled to be preferred to a prior equitable mortgage created by deposit of title deeds. Justify. Does sec. 48 of the Registration Act apply in such a case; (Cal. 1919, Jan.).—p. 206.

157. Write a short essay on "Clog on the right to redeem" with special reference to the facts of the case of *Noakes* v. *Rice*.—(Cal. 1918, *Aug.*; 1921 July; 1930 (July)—p. 231.

158. A executes a usufructuary mortgage deed in favour of B for a term of years. In it a stipulation is entered that if the mortgage money be not paid on the due date the mortgagor A will sell the property mortgaged to the mortgagee, B, at a price to be fixed by umpires. What are the rights and remedies of B, the mortgagee? (Mad. 1899)—**Ans.** The stipulation is in the nature of a clog on the right of redemption, see p. 232.

159. Can foreclosure or redemption of a part of the mortgage property be allowed? If so when?—**Ans.** Not allowed, see pp. 228-29.

160. Explain and illustrate the principle that law does not sanction *piecemeal* redemption or foreclosure. (All. 1925): see p. 229.

161. A mortgages his property to B. Subsequently A executes a simple money bond in favour of B with a condition that the mortgage shall not be redeemed without at the same time paying off the simple money bond. Can A redeem the mortgage without paying off the bond? Would it make any difference if the same property be mortgaged in the bond also? (All. 1927, Ext.)—**Ans.**; Yes, as the condition regarding the payment of the bond is a clog. (see p. 172); it would make a difference if the condition is embodied in a second mortgage, see sec. 61.

162. State and explain the doctrine of Consolidation. (All. 1900; Bom. 1901; Mad. 1913.)—p. 239.

163. What is the effect of accession, *in the absence of any contract to the contrary*, to the mortgaged property by mortgagor and mortgagee respectively? Discuss their respective right to such accessions. (Cal. 1914, July)—pp. 243-45.

164. Discuss whether acquisition by a mortgagor enure for the benefit of the mortgagee and conversely whether acquisitions by a mortgagee may be treated as accretions to the mortgaged property or substituted for it and therefore subject to redemption, (Cal. 1923, July)—pp. 243-44.

165. Discuss briefly whether the following are cases of accessions to mortgaged property under the T.P.Act:—(*a*) A house erected by a mortgagor on a plot of land mortgaged after the mortgage; (*b*) A mortgagee in possession of a Taluk acquired by purchase certain tenures subordinate to the Taluk but instead of keeping them alive as distinct tenures, treated them as merged in the Taluk. (Cal. 1916, Jan.)—**Ans**: Both are accessions: See pp. 243-46.

166. A zemindari let out in patni is mortgaged to a person by A. The patnidar makes default and the mortgagee purchased the patni at the sale. Is A entitled on redemption both to the zemindari and the Patni? Give reasons. (Cal. 1925, Jan.; 1922, July). pp. 250-51; also the P. C. case of *Kishen Dutt* v. *Mumtaz Ali*, 5 Cal. 198, at p. 251.

167. A mortgaged a certain estate to B and made over possession to him. A portion of the estate had been let out

it patni and B sued the patnidar for arrears of rent and purchased the patni in execution of the decree obtained by him. Subsequently A redeemed the mortgage and got back possession of the estate from the hands of B. Will A be entitled to recover from B the patni the latter had purchased, (Cal. 1916, July).—See *Raja Kishen Dutt's* case, p. 249.

168. Where property is mortgaged and the mortgagee is placed in possession of the property, is the mortgagee entitled on redemption to any of the following accessions? (*a*) A lease which expired and was renewed by the mortgagee in his own name (p. 251), (*b*) Where the mortgaged property is land and buildings or any new structures are erected by the mortgagee. (Cal. 1931, Jan.). [pp. 244 & 247]

169. Define the term 'Foreclosure'. (Cal. 1911, Jan.: All. 1906)—p. 263.

170. When can a mortgagee sue to 'foreclose' the mortgagor's right to redeem? (Mad. 1899).—p. 265.

171. Distinguish the rights of mortgagees of different descriptions to institute a suit for foreclosure or sale.—(Cal. 1915 and 1916, Jan.; Mad. 1909)—p. 264, *et seq*.

172. Can a suit for (*a*) foreclosure or (*b*) sale, be instituted by (i) a simple mortgagee, (ii) an usufructuary mortgagee, (iii) a mortgagee by conditional sale, and (iv) an English mortgagee? [Cal. 1923, Jan.]—see pp. 267-69.

172A. Can one of several mortgagors redeem his share of the mortgaged property; If so, in what cases; (All, 1925, Ext.)—see p. 227.

173. What are the different kinds of mortgages and the respective rights of the mortgagees according to the T. P. Act; (Cal. 1921, Jan.)—p. 190 & p. 259.

174. A executed an usufructuary mortgage deed in favour of B, the value of which was below Rs. 100. The deed was not registered. A did not put B in possession. B accordingly instituted a suit for possession and in the alternative for recovery of the mortgage money. Is B entitled to succeed? Discuss.—Cal., 1926, July.—Ans. Yes; see at pp. 279-80.

175. X sold some property to A, but prior to that mortgaged the properties to B. B brought a suit on his mortgage. A applied to be made a party but on B's objection could not be a party. B's suit was decreed. When B wanted to take possession, A resisted. B then sued for declaration of title and possession. Can A redeem B ?—(Cal. 1923, July)—**Ans** : Yes, A purchased the right of redemption and his such right is not defeated by his exclusion from the mortgage suit of B.

176. An estate is mortgaged to A for Rs. 5,000 by B. A sells his interest in the estate to C, a stranger for Rs. 3,000 Is C entitled as against B to the whole debt of Rs. 5,000 or only to the Rs. 3,000 he paid to A ? (Mad. 1903.) **Ans** : Whole debt of Rs. 5,000.

177. When can a mortgagee sue the mortgagor personally for the mortgage money before the date fixed for repayment. (Cal. 1915, Jan.)—p. 276.

178. State the interests transferred by, and the respective remedies of the mortgagees in the different kinds of mortgage enumerated in the T. P. Act. (Cal. 1922, July).—pp. 267-68.

179. What is the effect of release or purchase of a portion of the mortgaged property by the mortgagee ?—pp. 269-70.

180. State the rules regarding the rights of the mortgagee in possession to be paid his expenditure on improvements; (Mad. 1905.)—pp. 246-247.

181. A mortgagee has right of suit against the mortgagor. Can this right be transferred ? Give reasons for your answer.—Cal. 1927 (Jan)—**Ans** : Such a right is an incident of property and can be passed along with the property, p. 29.

182. A mortgagor mortgages his property for a debt and stipulates that on the failure of the mortgagor to pay the debt within a stipulated period the mortgagee would have the power to sell the property by auction. Would the stipulation be valid under the T. P. Act. (Cal. 1925, July) :—**Ans** : If the requirements as to the nature of the mortgage, the situation of the property, the conditions of applicability, provided in sec. 69 be fulfilled, the stipulation will be valid, otherwise not, being a clog on redemption.

184. Indicate briefly the rules contained in the T. P. Act, regarding priority as between successive mortgagees of the same property. (Cal. 1911, Jan. ; '14, July ; '16. Jan.)

185. Develop the law relating to priority amongst successive mortgagees of the same property. Give illustrations. —p. 337.

186. Illustrate the effect of the rule "Redeem up, for close down" by applying it to a suit by the third of five successive mortgagees who wish to get the property if his debt is not paid. (All. 1924).—see p. 338.

187. A mortgaged certain land to B but kept the title deeds himself. He then mortgaged the same to C over the documents of title at the same time. B now sues on his prior mortgage joining A and C as defendants. To what relief is he entitled ? Give reasons. (Mad. 1903.)—**Ans** : B loses his priority over C ; see p. 302.

187A. Explain the doctrine of tacking of mortgages. (All. 1900 ; Bom. 1902 : Mad. 1903)—pp. 334.

188. A property is mortgaged to A to secure a present loan and future advances. It is subsequently mortgaged to B *without notice* of the mortgage to A and then advances are made by A under his mortgage with notice of the mortgage to B. Would A be entitled to tack his advances against B ? (Cal. 1913, Jan.)—pp. 302-04

189. A holds certain property of B as security for advances made and to be made by A to B. B for valuable consideration assigns his reversionary interest in the property to C, notice whereof is given to A. A subsequently makes further advances to B, on the security of the same property. What are the rights of A and C respectively ? (Bom., LL. B. 1891). See Sec. 79 and *Gobindrav* v. *Ravji* at p. 305.

190. Two properties X and Y, valued at Rs. 1,000 and 2,000 respectively, are both mortgaged to A for Rs. 1,500 ; then X is mortgaged to B for Rs. 500, and lastly Y is mortgaged to C for Rs. 1,000. Can B compel A to marshal in his favour ? (Cal. 1921, Jan.)—pp. 309.

191. Explain the rule of contribution. (p. 310). What

happens when there is a conflict between Marshalling and Contribution? Illustrate your answer.—Cal. 1929, Jan. —(p. 313).

192. "Subrogation as a matter of right is never applied in aid of a volunteer." Explain and illustrate.—(Cal. 1920, July).—**Ans.** See *Tailby* v. *Official Receiver*, 13 A. C, (1888) 523.

193. "No person can *safely* lend money to a mortgagor to pay off a charge on the property without taking an assignment of the security"—Explain and illustrate. (Cal. 1922, Jan.)—p. 324-25.

194. Can a mortgagor or a third mortgagee pay off the first mortgage and claim to retain the rights of the first mortgagee?—(All. 1927. Ext.)—**Ans**: The third mortgagee can, but the mortgagor cannot, see pp. 324 & 329.

195. A mortgaged properties X and Y to B in 1904, and the same properties to C in 1906. In 1907 A sold property X to D, left part of the sale-price in his hands for payment to B. D redeemed B in 1908. In 1910 C sued on the basis of his mortgage and impleaded D as the defendant. Discuss D's equities. Cal. 1912, July).—**Ans.**: D cannot treat the first mortgage as kept alive; see 2. C. L. J., 288; he has at best the right to redeem C; see pp. 326 & p. 332.

196. State who are competent to redeem a mortgage, and state how they are to proceed if the mortgagee refuses to accept payment and to release the property. (Cal. 1916, July).—See secs. 91 & 83.

197. Who are the persons entitled to sue for redemption of the mortgaged property? Can a reversioner institute a suit during the life-time of a limited owner to redeem a mortgage by such limited owner? Give reasons for your answer.—(Cal. 1926 Jan.; 1927 Jan.)—See p. 321.

198. Who are entitled to redeem the mortgaged property? Can a reversioner to an estate in the hands of a Hindu widow redeem the mortgage while the widow is alive, —Cal. 1929, Jan).—No; see p. 321.

199. Who are necessary parties in an action for fore-

closure or sale on a mortgage? (p. 240). Can a paramount title be drawn into controversy in such an action?—(Cal. 1927 July; 1928 Jan.)—**Ans**: All persons interested in the mortgage security (see sec. 91) should be impleaded. O. xxxiv. r. 1, C. P. C. No; paramount title cannot be drawn into controversy.

200. What are the rights of a subsequent mortgagee paying off a prior mortgagee, when there is an intermediate mortgagee, as against the mortgagors and intermediate mortgagee respectively both in Indian and English Laws?—(Cal. 1925, Jan.);—see p. 337 & 350.

20A. A mortgages a property to B. The property is then attached in execution of a money-decree against A. During the pendency of the attachment A executes a fresh mortgage of the property in favour of C, agreeing to apply the mortgage money in payment of B's mortgage, which he does, and takes a reconveyance from B and hands over the deeds to C. X, knowing all facts, then purchases the property in execution of the money decree against A, and claims to take it free of C's mortgage. Is the claim sustainable? (Cal. 1902, July). **Ans**: No. See *Dinabundhu* v. *Jagamay*, 29 Cal. 154 (P. C.)—p. 327.

201. Enumerate the equitable right of subrogation. Who is entitled to invoke such a right and under what circumstances?—(Cal. 1924, Jan).—**Ans**: All persons entitled to redeem (excepting the mortgagor) are entitled to the right of subrogation on redemption of a prior mortgage.

202. Discuss whether the purchaser or mortgagee of the equity of redemption paying off a prior incumbrance is entitled as against intermediate incumbrancer, to stand in the place of the incumbrancer paid off.—(Cal. 1923, July; 1925, Jan.)—**Ans.** Yes, he can redeem under sec. 91 and therefore has the right of subrogation under sec. 92. The only person denied the right of subrogation is the *mortgagor*, which term, notwithstanding sec. 59 A, does not include the purchaser or mortgagee of the equity of redemption.

203. What principles are generally followed in deter-

mining priorities where equities are equal, between equitable mortgages, and between legal and equitable mortgages. **Ans** : In India law and equity are mingled together; therefore, priority is determined by time ; moreover, remember that in India, an equitable mortgage creates a right *in rem*. (p. 206)

204. A wishing to borrow money from B on security, deposits his title-deeds with him. B thereupon advances the money and immediately afterwards gets a formal mortgage-deed executed. The deed, however, is not registered. Can B recover on his security ? (Cal. 1927, July)—**Ans** : Yes ; if the transaction took place in the towns in which mortgage by deposit of title-deeds is permissible. Non-registration and consequent invalidity of the formal deed does not invalidate the earlier completed transaction.

205. Illustrate the difference between a charge and a mortgage, (Cal. 1917, Aug, ; 1922, Jan.)—pp. 345-47.

206. Distinguish between a charge and a mortgage. An instrument intended to be a mortgage failed as a mortgage owing to some technical defect ; can it operate as a charge ? (Cal. 1926, Jan.)—No. See p. 348.

207. How is a charge distinguished from a mortgage ? (p. 345). Can a mortgage which is not duly executed be enforced as a charge ?—(Cal. 1927, July)—No. see p. 348.

208. What is the interest that passes by a sale and a lease of immoveable property respectively—(Cal. 1918, Aug.). **Ans** : By a sale all the rights of a vendor are transferred ; by a lease only the right of enjoyment is transferred.

209. Define "lease", "premium" and "rent" (All. 1927)—See p. 357.

210. What are the statutory duties of a lessor ? (July 1913 ; All. 02 ; Mad. 02)—pp. 366-67.

211. What are the respective rights of a lessor and a lessee as against the other. (Cal. 1914, July)—pp. 367-70.

212. Give a short account in your own words of the

main rights and liabilities which the lessor and lessee of immoveable property have as against one another.—(Cal. 1926, July.) See pp. 366-77.

213. Define the extent and nature of the duty of disclosure imposed upon a lessor and a lessee in respect of the subject matter of the lease. (Cal. 1910, July)—p. 370 *et seq.*

214. What are the statutory liabilities of a lessee? (All. 97,01)—p. 368.

215. Formulate the law of Equitable Estoppel against the lessor or owner as laid down in the case of *Beniram* v. *Kundanlal*, 22 All., 496. (Cal. 1915, July; 1921, Jan). **Ans**: In order to make the doctrine of equitable estoppel applicable, the conduct or acquiescence of the party must amount to fraud or it must have the effect of altering the position of another person who acts on the faith of such conduct or acquiescence.

216. Discuss with reference to leading cases how far landlords are estopped from bringing actions in ejectment against tenants for erecting permanent structures on the land with knowledge of the landlords but without protest. Cal. 1929 (July)—see the last question.

217. Discuss how far a landlord may be restrained by rules of equity from evicting his tenant by reason of the tenant having erected permanent structures on the land leased.—(Cal. 1923, July; 1925, Jan.) **Ans**: See the leading case of *Beni Ram* v. *Kundan Lal*, at p. 376.

218. A lets a piece of land to B with a shed on it at a certain rent. B subsequently to A's knowledge converts the shed into a dwelling-house. Many years afterwards A sues to eject B, who sets up a title of absolute ownership. Can A succeed in such a suit? Is B entitled to any compensation? (Bom. LL. B. 1892.) **Ans**: Yes; A can eject B: mere knowledge of the conversion cannot set the doctrine of estoppel against A. B cannot claim compensation for the improvement he foolishly made; see p. 376.

219. Can a tenant who erects buildings on a demised

land claim compensation on being evicted on the termination of his tenancy? Discuss and refer to the leading case on the subject. (Cal. 1929, Jan.)—No. *Vide* the last question.

220. State the modes in which a lease of immoveable property determines under T. P A.; Cal. 1925 (Jan.); 1928 (Jan.).—p. 380.

221. How is a lease determined (*a*) by surrender, and (*b*) by forfeiture. Explain the difference in their effect on under-leases, stating reasons.—(Cal. 1929, July).—p. 395.

222. Write a note on the determination of a lease by forfeiture. (Cal. 1930, July)—p. 395.

223. What is the effect of surrender and forfeiture respectively on under-lease? (Cal. 1918, August)—p. 395.

224. How is a lease for an indefinite period determined according to the T. P. Act. (Cal. 1922, July)—**Ans:** By *merger*, *surrender*, *forfeiture* and *notice* to quit.

225. A lets a farm to B for the life of C. C dies but B continues in possession with the assent of A. What is the nature of B's occupancy? (Bom. LL. B. 1896.)—**Ans:** B's occupancy amounts to holding over; see *Illus.* (*b*) at p. 399.

226. Discuss on reference to leading cases how far landlords are estopped from bringing actions in ejectment against tenants for erecting permanent structures on the land with knowledge of the landlords but without their protests—(Cal. 1929, July).—see Q. 217 *ante*.

227. Can a tenant who erects buildings on a demised land claim compensation on being evicted on the termination of his tenancy? Discuss and refer to the leading case on the subject.—(Cal. 1929, Jan.)—see p. 376.

228. A lets six bighas of land to C for the purpose of a factory for a term of 30 years. The factory is not successful and C discontinues it but proceeds with the knowledge of A to erect shops and houses on the land. At the end of the term, A demands possession of the land. Can A recover in ejectment notwithstanding that he stood by and did not warn C against erecting shops and houses? If so, is A entitled to

the shops and houses for nothing? Discuss citing any relevant authorities. (Cal. 1926, July.) **Ans**: Although C cannot claim the benefit of sec. 51 (see p. 376), still A is not entitled to the shops and houses for nothing; C can remove his fixtures, and if A wants to retain them he will have to pay for the same.

229. What is the difference between surrender and forfeiture of a lease. Compare their legal effects on the under-lease and give reasons for your answer.—(Cal. 1924, July).—p. 395.

231. State the circumstances under which it may be competent to the lessor and the lessee, respectively, to put an end to the lease, although the term may not have expired. (Cal. 1919, July)—pp. 382-83.

232. A lets out land for manufacturing purposes to B for ten years. After expiry of the term, B is allowed to hold over. If A wants to eject B, to what notice would the latter be entitled? (Cal. 1923, Jan.)—see illus. (*d*) at p. 399.

233. A brings a suit for rent against his tenant B. B unsuccessfully sets up the title of a third party as landlord. Can A evict B on this ground before the expiry of the term of the lease? If after the suit A accepts rent from B for a subsequent period, will it make any difference in the position? (Cal. 1927, July).—**Ans**: See the Q. at p. 387.

234. What is requisite to effect the surrender of a lease (i) by express terms, (Mad. 1896), and (ii) by operation of law, (Mad. 1896; All. 1900).

235. State how a valid gift of immoveable property may be made under the T. P. Act—(Cal. 1918, Jan.)—p. 408.

236. What are the essentials of a valid gift?—(Cal. 1915 Jan: Mad. 1897)—p. 407.

237. In what cases is delivery essential for a valid gift [Cal. 1921 (Jan.); 1922 (July)]—(*a*) for moveables worth less than Rs. 100 if there be no registered deed, (*b*) Gift by a Mahomedan.

238. What are the conditions of a valid transfer by way of gift? (Cal. 1919, Jan.)—p. 407.

239. State if there is difference in the mode of transfer of immoveable property by *sale* and *gift*—(Cal. 1929, Jan.) —**Ans** : (*a*) gift requires attestation, but sale does not, (*b*) gift is registrable irrespective of value, but a sale for below Rs. 100 may be effected by delivery.

240. Can there be a gift of future property ? (*b*) Is it necessary to register a deed of gift relating to immoveable property valued at Rs. 85 ? (Cal. 1930, July)—**Ans** : (*a*) No, p. 408 ; (*b*) Yes ;

241. Analyse the essential elements of a gift under T. P. Act. State with reference to decided cases and statutes, how far the law relating to gift to unborn person in T. P. Act applies to Hindus : Cal. 1927, July.—**Ans** : For essential elements, see p. 407. The law of gift as contained in T. P. Act applies in its entirety to Hindus.

242. When may a gift be suspended or revoked ? (Cal. 1918, Jan. ; 1915, July ; 1913. Jan.)—pp. 415-16.

243. What is an onerous Gift ? (Mad. 1908, 1913)—p. 419.

244. A minor is the donee of an onerous gift. After attaining majority, he retains the property given. Is he bound to fulfil the obligation imposed by the gift ? (Cal.—1919, Jan.)—see p. 34 and p. 420.

245. *A* makes a gift of a piece of land to *B* on condition that the land would be liable to be taken back in the event of *B*'s transferring it. Is the gift valid ? Cal. 1920, July)—see secs. 10, 12 and 126, and 10 A. L. J. 702.

246. Explain—actionable claim (p. 9) ; constructive notice (p. 13) ; sub-mortgage, (p. 208) and clog on the equity of redemption (p. 230) ; (Cal. 1915, Jan.)

247. Give illustrations of the general rule that the assignee of an actionable claim stands in exactly the same position as the assignor as to the equities arising upon it, —See pp. 427-28.

248. What is an actionable claim ? "The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject, in respect

thereof at the date of transfer." Explain with illustrations.—(Cal. 1927, Jan.)—see p. 427.

249. What is an actionable claim? How can such claim be validly transferred? What matters are required to be done in order to bind the debtor of the Transferor?—(Cal. 1928, July).

250. How is an actionable claim defined in the T. P. Act, and what peculiarities attend the transfer of such claim? All. 1921—[N. B. The most important peculiarity is that the transfer becomes complete and effectual upon the execution of instrument in writing]

251. Can the assignee of an actionable claim sue the debtor without previous notice? (Cal. 1920, July)—p. 423-24.

252. Define an actionable claim and describe, how it may be transferred, as also the legal rights and liabilities of the transferee.—(Cal. 1924, July; 1929, July).

253. What is an actionable claim? How is the transfer thereof effected?—(Cal. 1926, Jan).—p. 422.

254. (*a*) How is an actionable claim transferred under the Act? (*b*) Distinguish between an *actionable claim* and a mere expectancy or naked possibility giving illustrations. (Cal. 1925, July).

255. What is the liability fixed upon the transferee of an actionable claim? (p. 427). Is the transferee of a negotiable instrument subject to any such liability?—Cal. 1926, Jan.). No. See pp. 424 & 432.

256. What is an actionable claim? Write a short note on the law relating to transfer thereof, (Cal. 1930, July).

SUPPLEMENTARY QUESTIONS.

257. (*a*) What do you understand by the term "Actionable claim"? How may a transfer of an "actionable claim" be made? How does such a transfer affect a debtor who has paid off the debt to the transferor (i) with notice. of such transfer by the transferee (ii) without such notice (b) State which of the following are 'actionable claims' giving reasons for your answer:—(i) A vendor's right to receive

the unpaid purchase money after completion of the sale, (ii) A decree, (iii) Right of a person to recover damages for breach of a contract, (iv) Right of a usufructuary mortgagee to obtain possession of the mortgaged property. (All. 1925, External).

258. A makes a will in Jan. 1927 whereby he gives a legacy of Rs. 10,000 to B. A tells B that he has done so. B is in need of money for his daughter's marriage. B goes to C immediately and executes a document selling his right to the legacy for Rs. 5,000. A is still alive. Discuss the validity of the sale of the chance of B's getting the legacy to C.—(Cal. 1928). **Ans**:—*spes successionis* cannot be transferred. The sale cannot be treated as an executory contract as C here purchases a mere expectation and not a property, see p. 110.

259. (*a*) X is the immediate reversioner to the estate of A which is in the possession of his widow, W. X sells his interest to Y. X dies before W and the reversioner at the time of W's death is Z. Can Y claim the estate as against Z, on the strength of the sale in his favour by X? (*b*) In the above case, if X survives W and becomes entitled to the estate as reversioner, can Y claim to retain the estate as against X? (*c*) In the above case suppose X contracts with Z for good consideration not to claim the estate in the event of his surviving W. He does survive W. Can Z claim the estate in preference to X on the basis of the contract? (All. 1923)—**Ans**: Y purchases only a *spes successionis* and cannot claim the estate as against Z. (*b*) Yes, X is bound to feed the estoppel. (c) The contract to abandon the reversionary claim is valid; therefore Z can claim the estate in preference to X; but if Z enters into the contract with X with notice of of executory agreement in favour of Y, he will have no preference over Y.

260. Discuss rules in the T. P. A. relating to interests created in favour of persons not in existence at the date of the transfer pointing out clearly when they are valid and when invalid?—(Cal. 1928, Jan.)—p. 45.

261. State fully the rules as to (*i*) the validity of transfer by an ostensible owner, (p. 102) and (*ii*) the transfer of property by an unauthorised person who subsequently acquires interest in the property transferred (pp. 106-09).—(Cal. 1928, Jan.).

262. "A document which requires to be registered but has not been registered may be admissible to prove a collateral fact." Explain with an illustration.—Cal. 1929, July.

263. (*a*) In what ways can a transfer of property be effected ? Mention the cases in which writing is essential to pass property to another. (*b*) What documents mentioned in the T. P. Act require compulsory attestation and registration, (All. 1926 Ext.)—see pp. 22, 156, 209, 364 & 408.

264. Explain and illustrate any *two* of the following terms :—actionable claim, perpetuity, election, lis pendens, foreclosure, caveat emptor, (Cal., 1921, July).

265. State if there is any exception to the rule that a person cannot set up his own fraud and recover property from his transferee. What is the reason of such exception. —Cal. 1920, Jan.—**Ans.** When the fraud is not carried into effect.—For reasons see *Judunath* v. *Ruplal*, 33 Cal, 967, at p. 149.

266. (*a*) Write a short note on the system of *benami* transfer. (*b*) A makes a *benami* transfer of a property to B, with a view to defraud his creditors, B afterwards sets up title to the property, claiming it himself. Can A recover the property from B ? Will it make any difference whether the creditors are actually defrauded or not ? Support your answer by reference to decided cases (Cal. 1927, July) : **Ans** : (*a*) The putting of one's property in the name of another amounts to making it *benami* ; the *benamdar* is the mere ostensible owner or a mere name-lender without the right of ownership. He occupies the position of a trustee for the real owner. (*b*) A can recover the property from B, if the fraud has not been carried into effect, *vide* the preceding question.

267. State the substance and effect of the provisions of the T. P. Act with reference to (*a*) purchases from the ostensible owner, (*b*) priority as between the different mortgagees of the same property.—(Cal. 1926, July)

268. Enumerate the four classes of documents of which registration is compulsory under the Ind. Reg. Act. (Cal. 1913).

269. State carefully the valid methods of, and the formalities necessary for effecting (*a*) a gift of land, (*b*) a gift of a tangible moveable; (*c*) a gift of a debt secured upon immoveable property; (*d*) a mortgage for Rs. 1000 of immoveable property (*i*) in Calcutta, (*ii*) in the muffusil—(Cal. 1926, July.)—**Ans**: (*a*) Both registration and attestation are necessary, (*b*) Registration (with or without attestation) or delivery of possession. (*c*) debt secured upon immoveable property is immoveable property (see p. 11), (*d*) (*i*) Registration and attestation or deposit of title deeds, (*d*) (*ii*), Registration and attestation.

270. What are the documents which are not compulsorily registrable under the Ind. Reg. Act but are so under the T. P. Act? Has Sec. 49 of the Registration Act any application to those cases?—(Cal. 1929, July.)

271. What is the effect of non-registration of documents of which registration is compulsory under the Ind Reg. Act? —(Cal. 1918, Aug.; 1926, July; 1928, Jan. 1931, July)—**Ans**: Not admissible in evidence to affect immoveable property; Sec. 49 I. R. Act.

272. Is a document which is compulsorily registrable but which has not been registered admissible in evidence for any purpose? (Cal. 1930, July)—*Vide* the preceding question. It is admissible for a collateral purpose.

273. What is the protection afforded by the Indian Registration Act to an oral agreement with possession when competing with a subsequent registered document?

274. An oral agreement relating to immoveable property was not followed by delivery of possession. Would it be protected against a subsequent competing registered

instrument if the person claiming under such registered agreement had notice of the prior oral agreement ?—(Cal. 1927. Jan.)—see pp. 170-171.

275. Registered permanent lease was granted to a Coal Company, under which royalties were payable at a certain rate per ton of coal quarterly ; subsequently the lessor by a letter which was not registered agreed to accept payment of the royalties at a reduced rate, the same being payable monthly. In a suit brought by the lessor to recover royalties in accordance with the terms of the original lease, is it competent to the Company to rely on the reduced rate provided for in the letter ? (Cal. 1914 ; Jan.).—**Ans** : No ; a letter addressed to a lessee by a lessor is inadmissible in evidence to prove the reduction of rent for want of registration ; *Raja Durga* v. *Rajendra*, 10 C. L. J. 570.

276. What is the effect of non-registration of a document the registration of which is optional ? (Cal. 1915, Jan.) See Q. 273, *ante*.

276 A : A institutes a suit against B for possession of a house. The suit ends in a compromise by which A and B divide the house half and half, and they also demarcate their respective portions. The terms of the compromise are embodied in a decree which is not registered. Is the partition of the house a binding agreement ? (Cal. 1932, Jan.). **Ans** .—Yes ; the partition being effected by a decree will not require registration.

277. What are the documents that must be registered, and how does the absence of registration affect the operation of any such document ? (Cal. 1916, July ; 1931 July).

278. "An unregistered instrument otherwise inadmissible by reason of non-registration, may be admitted in evidence for a collateral purpose for which registration is not necessary". Explain with an illustration.—(Cal. 1927, Jan.).—see Q. 272.

279 : The Registration Act, unlike the T. P. Act— strikes only at documents, and not at transactions ":

Explain and illustrate—(Cal. 1922, Jan.)—**Ans**: This question and the two precedings one virtually mean the same thing. It implies that the question of registration or non-registration simply affects the admissibility of a document and not the rights of the parties. By reason of non-registration, the document is thrown out so as not to touch the *land*, as distinguished from the contract itself, but the transaction or the contract stands, if it can be established without contravening sec. 91 of the Evidence Act. The case contemplated by sec. 53A will be an illustration in point. Another illustration is when the mortgage fails because of non-registration, yet the money given out on loan may be recovered as a simple debt.

280. Discuss how far an agreement to lease requires registration.—(Cal. 1927, July).—See pp. 358-59.

281. In a prior suit between A and B with regard to one part of an ancestral estate it was agreed to divide the whole of the ancestral estate equally between themselves. A petition was filed in that suit signed by A and B embodying the terms of the compromise; but the Judge was asked to give effect to the compromise in so far as it related to the portion of the estate which formed the subject-matter of the suit, and the order of the Judge made no reference to the other portion of the ancestral estate which consisted of land valued at Rs. 50,000. The petition of compromise was not registered. In a subsequent suit brought by B for recovery of his moiety of that portion of the ancestral estate which was left out in the prior suit, the claim was made on the strength of the aforesaid compromise petition. State if the said petition of compromise affected the rights of the parties in respect of the land which forms the subject of the second suit. Give reasons. (Cal. 1917, Jan.)—**Ans.** No; although the provisions of Sec. 17 of I. R. Act do not apply to judicial proceedings, *Pranal Anni* v. *Lakshmi Anni*, 22 Mad.; 508 (P. C.); also see 2 C. W. N. 663; 7 C. L. J, 492; 22 C. L. J. 44; 47 Cal., 485 (P. C.).

282. Your client is advancing a sum of Rs. 10,000 to

an illiterate *pardanashin* lady on the security of *her* properties. What steps will you take to ensure the validity of the mortgage to be executed by her? (Cal. 1917, Jan.). **Ans**: (*a*) See that it is her *peculium*: (*b*) that she understands what she is about; (*c*) that she has independent advice: (*d*) that the deed is properly attested and registered: (N. B.—The question does not say that she is a Hindu lady with a limited interest acting under legal necessity); Cf. 35 Cal. 420 (P. C.); 34 C. L. J., 529; 42 C. L. J., 531 (P. C.)

283. A memorandum of agreement witnesses that A has contracted to sell to B a house for Rs. 10,000 and has received from B Rs. 1000 as earnest money. Is the memorandum a document which is required to be registered? Are you aware of any recent legislation on this question? (Cal. 1931, July)—See pp. 167-68.

284. Discuss the following cases giving the grounds of your views: (*a*) A builds a house on vacant land which he knows is not his. Could the owner of the land eject A without compensating him for the house? (*b*) A is entitled to certain land on the death of X. B knows that X is dead and also knows that there are minerals under the land. B, knowing that A is ignorant of both these facts buys the land without disclosing them to A. Could A impeach the sale on either or both of the grounds given above. (*c*) A leases land to B at a monthly rent subject to a condition that he may terminate the lease if the rent is at any time three months in arrears. The rent being four months in arrears, B pays the arrears to A. Could A, after accepting the payment, forfeit the lease? (*d*) Property is transferred upon trust for A for life and after his death upon trust to maintain his family during the life of X, and on the death of X to divide the property among such of A's children and grand children as may then be living. Is the disposition valid? (*e*) A mortgagor by conditional sale, being in possession of the mortgaged property as tenant of the mortgagee and being threatened with foreclosure, burns down a house which is the most valuable part of the property. Could the

mortgagee sue him for the amount of the mortgage-money? (All. 1924.)

Ans : (*a*) Yes, he must suffer for his foolish act, (*b*) yes, p. 181, (*c*) A has waived the forfeiture, pp. 391-92, (*d*) yes, the provisions of secs. 13, 14 are not contravened. (*e*) yes, see sec. 68 (*c*).

285. A is the owner of a fishery; B is the holder of a leasehold interest in a hotel. B borrows money from A on the mortgage of his leasehold interest on the stipulation that throughout the term of his lease all the fish consumed in the hotel should be purchased from A. B pays off the mortgage debt in full before the expiry of the term of his lease. Does the stipulation about the purchase of fish continue? (Cal. 1931, July)—No; it is a clog on redemption.

286. A, an illiterate person, signed a deed of mortgage by putting his mark on the document. The mark was described by the scribe of the deed. The deed was also attested by two independent witnesses. Subsequently, the deed was sought to be proved by the testimony of one of the witnesses and the scribe. Was the deed duly proved? Discuss—(Cal. 1929, July.).

287. Is registration of the following compulsory under the I. R. Act—(*a*) a deed of gift of immoveable property worth rupees fifty; (*b*) an agreement with reference to a property which has no value, (*c*) an agreement as to an annuity of Rs. 550 and (*d*) a Will? (Cal. 1917, August).

288. What order would you pass under the following circumstances and why?—A mortgaged certain property in 1893, and thereafter, during the same year, sold his equity of redemption to B and C. In 1894, upon his failure to discharge the debt by a certain date, the mortgagees were put into possession. In 1895 the mortgagees made a further advance to A. Subsequently B and C sued for redemption tendering a sum sufficient to discharge the original mortgage of 1893. The mortgagees refused to accept the tender,

pleading that the plaintiffs were bound also to repay the subsequent advance. (All. LL. B. 1901). **Ans.** As no fraud (nor improper conduct) has been imputed against B and C, they are not bound to pay the subsequent advance.

289. A and B mortgage their respective villages X and Y to C for Rs. 50,000, the value of X being two-thirds of the value of Y. After due date C sues on the mortgage, obtains a decree for sale, and has the village X sold. The sale realises Rs. 4,000 and B pays the balance of C's claim, viz. Rs. 1,000. What are the remedies, if any, of A and B against each other? (All. LL. B. 1905). **Ans.** Under Sec. 82 of the T. P. Act, X is to contribute Rs. 2,000 and Y Rs. 3,000; therefore A is entitled to get Rs. 2,000 from B and has a charge for that amount on village Y.

290. X, a lessee of immoveable property under an unregistered lease executed by Y, sues the latter for possession of the property. During the pendency of this suit Y executes a registered lease about the same property in favour of Z. Is the lease of Z entitled to priority. State your reasons. (Cal. 1917, Aug.). **Ans:** No; Z is bound by the doctrine of *lis pendens*. See 6 All., 444.

291. A land is sold to A for Rs. 200 by a deed executed in January; possession is delivered and the deed is registered in March. The same land is sold to B for Rs. 300 by another deed which is executed and registered in February of the same year. Whose title will prevail? **Ans.:** A's; see p. 166.

292. A document mortgaging only one item of property was duly executed and attested. Another item was subsequently interpolated by the mortgagor in the presence of the same attesting witnesses. The mortgagor registered the deed in the Sub-registrar's office, within whose jurisdiction only the second item of property was situated. No fraud was intended. Is the document valid with regard to both or any of the items of property? (Cal. 1920, July). **Ans.:** It is valid with regard to both the properties. The facts of the problem are taken from *Kunhi Sankaran* v. *Narayan*, 43 Mad., 405. Cf. *Harendra* v. *Haridasi*, 41 Cal., 972 (P. C.).

293. A executes two conveyances in respect of the same property, first, in favour of B, and then in favour of C. Consideration passes in respect of both the transactions, but C is placed in possession of the property, and C's conveyance is also registered before B's. As between B and C, whose title will prevail, (i) if C had notice, and (ii) if C had no notice, of the conveyance to B ?—(Cal. 1910, July)—see 22 C. W. N., 318 at p. 166.

294. (*a*) A Hindu widow whose husband has left collateral heirs falsely alleges legal necessity and transfers her husband's property to a stranger.

(*b*) A sells his property to B while a previous contract for sale of the property to C is still subsisting ;

(*c*) A sells his property which is subject to a lease and an easement, to B ; can the purchaser get a free title in any of the above cases, and if so, under what circumstances ? (Cal. 1924, Jan.)

295. Explain and illustrate the general principle of law underlying or relating to any two of the following :—

subrogation; marshalling ; contribution ; covenant running with the land; emblements; improvements made by *bona fide* holders under defective title. (Cal., 1924, Jan.).

296. Discuss the registrability of the following documents :—(*a*) leases of of immoveable property (p. 364) ; (*b*) wills, (*c*) receipts for payment of money due under a mortgage. [N.B. No registration necessary in case of (*b*) and (*c*)].—Cal. 1924 (July). *Vide* Q. 303, *infra*.

297. State, giving reasons, whether the following documents require registration :—

(*a*) Lease of immoveable property for six months.

(*b*) Legacy of immoveable property valued at Rs. 5,000.

(*c*) Authority to adopt a son.

(*d*) An agreement to execute a sale deed (of immoveable property valued at Rs. 10,000), when the balance of the price is received (some part thereof, say Rs. 1,000, having been paid as earnest money at the time of the agreement.). (Cal. 1924, Jan.)

298. A claims title to property under a registered conveyance from the owner. B claims title to the same property as purchaser at a sale held in execution of a decree obtained on a prior unregistered mortgage granted by the owner. Discuss the question of priority as between the two rival purchasers.—(Cal. 1924, Jan.)

299. How can an exchange or a lease of immoveable property be made under the Transfer of Property Act? Compare the process with that of a mortgage or a gift. Take only *one on* each side and compare,—(Cal. 1924, Jan.). **Ans** : (i) a lease from year to year or for a term exceeding one year or reserving a yearly rent, requires registration other leases may be made by registration or delivery of possession (ii) a mortgage requires registration (irrespective of the question of duration) if the property is worth Rs. 100 or upwards, mortgage of properties worth less than Rs. 100 may be effected by registration or delivery of possession. In lease both parties must sign, but not so in mortgage; mortgage does (but lease does not) require attestation. Exchange is effected like a sale and the value of the property has an important bearing on its effectuation by registration or delivery of possession. No attestation is necessary for it. Gift is dependent on registration and attestation irrespective of value.

300. "Courts of Law always lean against forfeiture."—Explain and discuss with reference to Mortgage and Lease. (Cal. 1924, Jan.)—**Ans** : (1) In the case of mortgage such leaning is perceptible in the concession given to a mortgagor to redeem up till the last moment of actual foreclosure and under certain circumstance even to re-open foreclosure (see p. 266) and in the denial of the right of foreclosure (which implies forfeiture) altogether in a great majority of cases (p. 264) and (2) in the case of lease it is perceptible in the facility given to a lessee for avoiding forfeiture by making good his breaches. (see pp. 391-94).

301. Discuss whether the purchaser or mortgagee of the equity of redemption paying off a prior incumbrance is

entitled, as against intermediate incumbrancers to stand in the place of the incumbrancer paid off.—(Cal. 1923, July.)—see p. 329.

302. Can a suit for (*a*) foreclosure or (*b*) sale be instituted by (i) a simple mortgagee, (ii) an usufructuary mortgagee, (iii) a mortgagee by conditional sale, and (iv) an English mortgagee? (Cal. 1923), Jan.).—see pp. 264 & 267-68.)

303. State which of the following documents require registration—

(i) Lease of immoveable property, (p. 364).

(ii) Wills, (optional).

(iii) Receipt for payments of money due under a mortgage.—(Cal. 1925, Jan.; 1914, July). [No registration necessary if the receipt does not purport to extinguish the mortgage-transaction; Cf. 10 Mad., 64, F.B.—42 C. L. J. 582; 44 Bom., 55.]

304. Do the following documents require to be registered?

(*a*) An agreement to sell immoveable property by payment of Rs. 1,000 by way of earnest money (No, see pp. 358-59).

(*b*) Authority to adopt when conferred by a non-testamentary instrument—[Yes, see sec. 17 (3), I. R. Act].

(*c*) Adoption deed [Registration not necessary, if the deed does not purport to create or convey interest in immoveable property worth Rs. 100 or upwards]—[Cal. 1931, Jan.]

305. (i) Who are necessary parties in an action for foreclosure or sale on a mortgage? (ii) Can a paramount title be drawn into controversy in such an action? (Cal. 1928, Jan.)—Ans: (i) All persons having an interest in the mortgaged property or in the right of redemption: See O. xxxiv, r-1, C. P. Code, (ii) No.

306. Will a registered bond relating to moveable property over a prior unregistered bond relating to the same property? Give reasons for your answer. (Cal. 1923, Jan.).

307. A landlord lets out a plot of land to a tenant at a yearly rental of Rs. 50 in perpetuity. After sometime the landlord agrees to reduce the rent to Rs. 40. Is it necessary to have the agreement registered in order that it may be effective? (Cal. 1930, (Nov.)—**Ans**: modification of a registered deed can be effected only by means of another registered deed.

308. A purchases at an execution sale immoveable property X. He does not know at the time that it is subject to mortgage. Subsequently he discovers that it is subject to two mortgages—the first being a usufructuary one in favour of M, and the second being in favour of N. There is a covenant in N's mortgage that N would get and retain possession till his debt is paid after the debt due to M is satisfied. On coming to know of these mortgages A pays up M. N then sues A for possession. Can A successfully resist the suit? If so, on what grounds? [Cal. 1932, Jan.]

309. A grants to B a lease of a revenue-paying property, the lessor undertaking to pay revenue. There is a covenant in the lease that if the property is sold for arrears of revenue, the lessor shall make good the loss of the lessee, A thereafter transfers his interest to C, and thereafter, on account of default in the payment of revenue, the property is sold, and B, the lessee, suffers loss to the extent of Rs. 1,000. B sues A for the loss. What is your answer? "Give reasons. [Cal. 1932, Jan.]"

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